

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

77-1072

**United States Court of Appeals
For the Second Circuit**

Docket Nos. 77-1072; 77-1073

THE UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM J. ROTHAR, ET AL.,

Appellants.

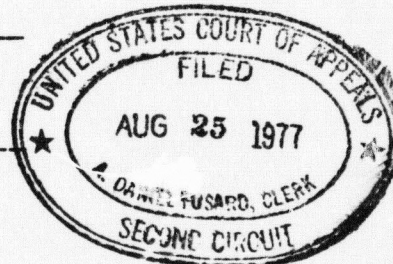
*Appeal From The United States District
Court For The Eastern District of New York*

APPELLANT'S APPENDIX

STEPHEN R. LAIFER
Attorney for Appellant
William J. Rothar
166 Montague Street
Brooklyn, N.Y. 11201
(212) 855-8855

MARTIN LIGHT
Attorney for Appellant Arcuri
66 Court Street
Brooklyn, N.Y. 11201
(212) 834-8888

MARVIN PREMINGER
Attorney for Appellant Sciuto
66 Court Street
Brooklyn, N.Y. 11201
(212) 875-5145



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA

- against -

PHILIP PETER ARCURI,
WILLIAM J. ROTHAAAR,
ANTHONY S. SCIOTTO and
JOSEPH F. GRANDE,

Defendants.
----- X

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 20th day of May, 1976, within the Eastern District of New York, the defendant PHILIP PETER ARCURI, the defendant WILLIAM J. ROTHAAAR, the defendant ANTHONY S. SCIOTTO and the defendant JOSEPH F. GRANDE, did knowingly and intentionally possess with intent to distribute approximately three hundred thousand (300,000) tablets of phenobarbital, a Schedule IV controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2).

COUNT TWO

Commencing on a date unknown to the Grand Jury and continuing until and including May 20, 1976, within the Eastern District of New York, the defendant PHILIP PETER ARCURI, the defendant WILLIAM J. ROTHAAAR, the defendant ANTHONY S. SCIOTTO and the defendant JOSEPH F. GRANDE, did knowingly and intentionally conspire to commit an offense against the United States in violation of Section 841(a)(1), Title 21, United States Code, by conspiring to knowingly and intentionally possess with intent

I N D I C T M E N T

Cr. No. 76-1131
(Title 21, U.S.C., §841(a)(1)
and 846, and Title 18, U.S.C.,
§2)

BEST COPY AVAILABLE

to distribute approximately three hundred thousand (300,000)
tablets of Phenobarbital, a Schedule IV controlled substance.
(Title 21, United States Code, Section 846).

A TRUE BILL.

FOREMAN

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

002

APPEAL

0719

76CR 332-2

WILLIAM J. ROTHAAAR

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4

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382

2

NEAHER, J

76 M 984

21-841(a)(1)& 846 Did possess with intent to
18-2 distribute Phenobarbital**CLOSED**

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Custody Warrant	Information 6/7/76	6/7/76	
Summons Served			
First Appearance			
5-21-76			

AMT	Fugitive
	☒
	☐ Recog
	☐ PSA
	☐ Conditions
10.	☐ 10% Deposit
	☐ Surety Bond
	☐ Collateral
	☐ Bail Not Made
	☐ Status Changed (See Docket)
	☐ Pity Cue
	☐ Other

SENTENCE

6.21.77

MAGISTRATE		INITIAL/NO	OUTCOME
Search Warrant	Issued		
Summons	Issued		
Arrest Warrant Issued			
COMPLAINT			
OFFENSE (In Complaint)			
5-21-76ASC/070B			
Possession with intent to distribute app. 300,000 Tablets of Phenobarbital. T-21 USC Section 846.			

U.S. Attorney or Asst.

ATTORNEYS

Defense: ☒ CJA ☒ Warden ☐ None / Other: ☐ PD 1700

Gary Woodfield

Steven Laifer, Esq.
16 Court Street
Brooklyn, New York

* Show last names and suffix numbers of other defendants on same indictment/information

ARCURI-1, SCIOTTO-3, GRANDE-4

DATE	DOCUMENT NO.	PROCEEDINGS
6-7-76		Deft. indicted - See 76 CR 382.
6-7-76		Before NEAHER, J - Indictment filed.
6-21-76		Before CHREIN, Mag. - case called - all defts plead not guilty - adjd to July 6, 1976 Before Neaheer, J.
6-22-76		Notice of readiness for trial filed
7-6-76		Before NEAHER, J. - Case called. Deft & counsel present. Case adj'd to 11-29-76 at 10 A.M. for trial. Case adj'd to 9-15-76 at 10 A.M. for status report. Bail continued.
9/15/76		Before NEAHER, J. - Case called. Deft present w/o counsel. Case adjd to 11/29/76 at 10:00 a.m. for trial.
11-29-76		Before NEAHER, J - case called - deft not present - counsel not present - adjd to 12-13-76 for trial 11-29-76 M 12-13-76
12-13-76		Before Neaheer, J.- Case Called. Deft. & Counsel present. Deft's. motion to suppress evidence found in white car after search - denied. Deft's. motion to dismiss the indictment - denied. Suppression hearing begun. Hearing concluded. Case continued to 12-14-76 at 10:30 A.M. for Trial.

12-14-76 Before Neaheer, J.- Case Called. Deft. & Counsel present. Trial ordered and begun. Jurors were selected and sworn. Govt. opens. Deft. opens. Trial continued to 12-15-76 at 10:15 A.M.

12-15-76 Before Neaheer, J.- Case Called. Deft. & Counsel present. Trial resumed. Trial continued to 12-16-76 at 10:00 A.M.

12-16-76 Before Neaheer, J.- Case Called. Deft. & Counsel present. Trial resumed. Govt. rests. Deft's. move for judgment of acquittal - denied. Deft's. move for dismissal of count two (2) - granted. Deft. rests. Trial continued to 12-17-76 at 10:00 A.M.

12-17-76 By NEAHER, J. - Order of sustenance filed.

12-17-76 Before Neaheer, J.- Case Called. Deft. & Counsel present. Trial resumed. Jury returns a verdict of GUILTY as to count one (1). Jury discharged. Deft's. move to set aside verdict - denied. Bail continued. Case adjd. without date for sentencing. Trial concluded.

1.25.77 Before Neaheer, J.- Case Called. Deft. & Counsel not present. AUSA moves the Court for an issuance of an arrest warrant. Motion granted. Bench Warrant ordered.

1-26-77 Bench warrant issued

2.25.77 Stenographer's Transcript dated 12.13.76 filed.

3/9/77 Amended bench warrant issued.

3-14-77 Magistrates proceedings filed received from Clerk, Southern Dist. of Fla. and acknowledgment mailed to Clerk for receipt of papers.

3-21-77 Before Neaheer, J - case called - deft & atty Stephen Laifer present - deft is sentenced for study and report pursuant to 18:4205(c) Clerk to file Notice of appeal in forma pauperis. Form A filed - Bench Warrant retd and filed - executed.

3-21-77 Judgment & commitment filed - certified copies to Marshal.

3-21-77 Notice of appeal filed (no fee) Docket entries and duplicate of Notice mailed to the court of appeals

3-23-77 Judgment & commitment retd and filed - deft. del. to Warden, MCC, NY

4.26.77 Stenographer's Transcript dated December 13, 1976 filed. GP

5.11.77 Stenographer's Transcript dated December 16, 1976 filed. GP

6.21.77 Before Neaheer, J.- Case Called. Deft. & Counsel present. Deft. after being found guilty by a jury verdict is sentenced: 3 years imprisonment pursuant to T-18, U.S.C., Section 4205(b)(2) plus 1 year special parole term. Deft. informed of his right to appeal. Deft. remanded pending Federal appeal. Clerk to file notice of appeal (no fee) S. Laifer assigned by court. GP

6.21.77 Judgment and Commitment filed. Certified Copies to Marshal and Probation.

6-22-77 Judgment & commitment retd and filed - deft. del to MCC.NY GP

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

WILLIAM J. ROTHAAAR

76

Yr.

382

Docket No.

3

Def.

V. EXCLUDABLE DELAY

(a) (b) (c) (d)

DATE	PROCEEDINGS (continued)	(a)	(b)	(c)	(d)
6-21-77	(Document No.) <i>1907.111 or Appeal No. 12852</i>				
6-23-77	Financial affidavit filed.				
6/29/77	Certified copy of judgment & commitment ret & filed. Deft delivered to MCC. jlj				
7/5/77	Scheduling order filed rec'd from C of A that the supp record on appeal should be filed on 7/6/77. jlj				

1
2 Q Who was that?

3 A Tony or Anthony -- I don't know his last name.

4 Q Do you know that to be Anthony Sciotto?

5 A Yes.

6 Q At that time, May 18, 1976, did you know his
7 last name?

8 A No, I didn't.

9 Q You knew him as what?

10 A Tony.

11 Q No question that it's the same individual?

12 A No question.

13 Q What was the conversation you had on that date,
14 May 18, 1976?

15 MR. LAIFER: I object on behalf of Mr. Rothbar
16 and ask your Honor give instruction to the jury that
17 it is not binding on Mr. Rothbar.

18 MR. LIGHT: I object on behalf of Mr. Arcuri,
19 who was not present.

20 THE COURT: Ladies and gentlemen, I will instruct
21 you at some point that with regard to the participation
22 of any defendant, you may judge him only by his own
23 statements or his own conduct. What somebody else might
24 have said or done, we will not, as a rule, be
25 admissible against him unless certain conditions are

satisfied. For present purposes, you may take this evidence, whatever it is, as against only the defendant involved. At some later point, I may have some further instructions on that score for you.

MR. WOODFIELD: Well, your Honor, I was going to bring to your Honor's attention, of the conspiracy count. Is that the way you want to handle it?

THE COURT: I think so.

Q What was that conversation that you had with Anthony Sciotto on May 18, 1976?

A He called me on the telephone.

Q Where were you?

A In my office in the laundermat in the back room.

Q What was the conversation?

A He said he had some pills and I said, what kind of pills. He said, headache pills and I told him to bring me a sample.

Q Did he indicate how many he had?

A Yes, he said he had 350,000.

Q Did he indicate what kind of pills they were?

A He didn't know at the time.

Q Did he tell you that he didn't know?

A Yes. He says, "For the head."

Q Prior to this, had you had any similar dealings

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A That's right. He came to my office.

Q Where is that?

A On Kings Highway.

Q That's the laundromat?

A Laundromat, and he told me he had the pills.

I says, "What kind of pills?"

MR. LAIFER: Of course, your Honor, would your Honor give the same instruction to the Jury with reference to the two defendants?

MR. WOODFIELD: I object to that constant interruption.

THE COURT: I will not give the instructions to the Jury after every answer. I am sure the Jury understood the instruction covered matters generally, at the time.

MR. LAIFER: Thank you.

THE COURT: You want the question read back?

THE WITNESS: I know the question.

Q What happened that morning?

A He came to my office. He told me he had the pills and I says, "Where are they?" He says, "In the car." I says, "Where is the car?" He says, "Around the corner." And I says, "How many pills do you got? All of them in the car?" He says, "All 350,000." I says, "Bring it in the front

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Q What type of car was it?

A It was a White Lincoln.

Q Do you remember anything in particular about that car?

A Yes, it had a dent on the rear fender; on the passenger side of the car.

Q Where were those pills in the car?

A In the trunk.

Q Mr. Sciotto drove that car up to your laundromat?

A Yes, he did.

Q Could you go back in the conversation you had in your office in your laundromat, Mr. Grande?

A When Tony came in and saw what kind of pills they were, he said to me that if he knew they were like this, he wouldn't have brought them.

Q Did you actually see what kind of pills they were?

A At that time, we did. We saw they were Phenobarbital but old and burnt.

Q How did you know they were Phenobarbital?

A It ran on the bottle, Phenobarbital and I know Phenobarbital because I have an invalid mother-in-law that I give this to.

Q So, you know what the substance was?

Grande-direct

1
2 A Yes. When he saw what it was, he said, "If I
3 knew it was this, I wouldn't have brought it to you."

4 Q At any time, at this point, did you discuss
5 price of these pills?

6 A Yes.

7 Q What was that conversation?

8 A Well, when he brought them, he told me they
9 wanted four cents a piece.

10 Q Did he indicate who wanted four cents a piece?

11 A No, he did not.

12 Q What exactly did he say, as you can recall?

13 A He says, "They want four cents a piece for them."
14 I said, "What kind of pills are they?" And he didn't know at
15 the time until we saw what they were.

16 Q After you opened the pills up, what did you do
17 then?

18 A We saw what they were and he apologized for
19 bringing them and I says, "Get them out of here." He says,
20 "I am going to call the guys," and went to the pay phone --

21 Q Where is that located?

22 A It's in the front of the -- my store.

23 Q What did he do?

24 A He made a call.

25 Q Did you overhear the phone call at all?

Grande-direct

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A No, I didn't.

3

Q What did he do next?

4

A He told me he would get in touch with me later
and he left.

6

Q Did he get in touch with you later?

7

A Yes, he called me later, in the afternoon, and
told me that the guys wanted five hundred dollars and I told
him I didn't want these pills and he asked me to get him off
the hook, that he's stuck and he put someone on the phone to
ask me for the five hundred dollars. I told him I wouldn't give
him five cents, to come and get these things out of here and
hung up on him.

14

Q You spoke to someone on the phone other than
Tony, who you know as Tony, Anthony Sciotto?

15

16

A Tony I knew. The other individual, I didn't
know who he was.

17

18

Q Did he introduce himself?

19

A No, he didn't.

20

Q Did you attempt to reach Mr. Sciotto later that
day?

21

22

A Yes, I did. Later that evening, I tried to
call him at home.

23

24

Q Did you reach him?

25

A No, I didn't.

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Q Did you speak to him at all again that day?

3

A No, I didn't.

4

Q What if anything did you decide to do, Mr. Grande?

5

A I told him, in the course of the conversation

6

that I had with him, that when the other gentleman talked to

7

me, "If you don't come and get them, I am going to dump them.

8

Get them out." That was the extent and I was going to dump

9

them.

10

Q On May 20th, that was the day you were arrested?

11

A That is correct.

12

Q What did you do that morning?

13

A I was taking them out to the car.

14

Q Taking what out to the car?

15

A The boxes of pills.

16

Q Taking from where?

17

A From the back of my laundromat.

18

Q To whose car?

19

A To a car a friend of mine loaned me and I --

20

Q What happened at that time?

21

A As I got to the trunk of the car, the police

22

came; the agents, to arrest me.

23

Q From what agency; do you know?

24

A The drug agency.

25

Q Were you arrested at that time?

8d

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A I called Tony but I didn't have his number.

3

Q How did you get it?

4

5

A I called a mutual person that we knew and asked for Tony and he told me where he was at; Nostrand Avenue somewhere.

6

7

Q He gave you a number?

8

A He gave me a number.

9

Q Did you speak to Tony?

10

A The second time I called Tony. He wasn't there the first time.

11

12

MR. WOODFIELD: Mark this please.

13

14

THE CLERK: Tape Cassette marked Government's Exhibit 1 for identification.

15

16

Q Mr. Grande, I show you what has been marked Government's Exhibit 1 and ask you if you can identify that

17

A Yes, I can.

18

Q How are you able to do so?

19

A I heard the tape at your office and signed i

20

Q How do you know it's that tape?

21

A My signature is on it and date.

22

23

Q Is that tape a recorded conversation that you had with Mr. Sciotto on May 20, 1976?

24

A Yes, it is.

25

Q Does it accurately reflect the conversation that

Grande-direct

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2

you had on that date?

3

A Yes, it does.

4

MR. WOODFIELD: I offer it in evidence at this time, your Honor.

5

6

MR. LAIFER: I object on behalf of Mr. Rothbar.

7

MR. LIGHT: I object on behalf of Mr. Accuri.

8

He was not part of the conversation.

9

10

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THE COURT: Members of the jury, I will remind you once again, I am giving you what is known as a limited instruction, that this evidence at this time is not being taken as admissible against any other defendant except the defendant Sciotto. Do you understand?

14

(Pause.)

15

16

For present purposes, that's all. At some point, as I said, I may have to give you some other instruction.

17

18

MR. PREMINGER: May I have a voir dire on this, Judge, if you please?

19

20

THE COURT: All right.

21

VOIR DIRE EXAMINATION

22

BY MR. PREMINGER:

23

24

Q Mr. Grande, do you remember when it was that you had this conversation with Mr. --

25

A I'm sorry I didn't hear you.

1 those calls. The original is in an envelope, either
2 here or in my office, and it was sealed. It was
3 sealed exactly after the time it was made.
4

5 MR. PREMINGER: Then, what's the problem?

6 MR. WOODFIELD: The problem is, I can't bring
7 an agent in and say they had custody of this copy.

8 THE COURT: Let me put it this way: should we
9 play the original?

10 MR. WOODFIELD: I could -- to play the original
11 now, I would have to spend some time on the original
12 where the conversation commences.

13 THE COURT: Can't we play the copy? At some
14 future time, you can bring down the original and we
15 can settle down here.

16 (Thereby the side bar discussion was terminated.)

17 MR. WOODFIELD: I will offer this into evidence
18 at this time.

19 MR. PREMINGER: Subject to your Honor's ruling.

20 THE COURT: Stick to the side bar discussion.

21 THE CLERK: Government's Exhibit 1 marked in
22 evidence.

23 CONTINUING DIRECT EXAMINATION

24 BY MR. WOODFIELD:

25 Q Mr. Grande --

1
2 going to my office. So, he came to the door, going into my
3 office. I hadn't seen him walk in.

4 Q You were scheduled to meet him at a later time
5 at a street corner; is that correct?

6 A That's correct.

7 Q He came into your office at that time?

8 A Yes.

9 Q Did you expect him?

10 A No, I didn't.

11 Q What, if anything happened? What did he do or
12 say?

13 A I asked, "What are you doing here?" He said,
14 "I brought the fellows." I said, "What fellows?" He said,
15 "The fellows that come for the money."

16 MR. LIGHT: I will object to this, at this time.

17 THE COURT: Overruled.

18 MR. LAIFER: May we have a limited instruction
19 that Mr. Arcuri was not present at the time this
20 conversation took place between --

21 THE COURT: At the moment, we don't have any
22 identification. Do you understand?

23 Q What was the conversation?

24 A He says, "I brought the fellows to collect the
25 money."

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Q What did you say?

A I said, "Give me five minutes."

Q Where was the agent at this time?

A Sitting right there, with his back to me and he walked out.

Q Who did?

A Tony. He walked out and said, "Okay, I'll be back in five minutes." He walked out. I got up from my desk and the agent said, "Who was that?" I said it was Tony.

MR. LAIFER: Objection as to what the agent said.

THE COURT: I will overrule the objection on the completion of the conversation.

MR. LAIFER: It is hearsay and outside the presence of any defendants. In other words, it was a conversation had by Mr. Grande and an agent, outside of the presence of the defendant in this case and constitutes hearsay, what he said to Agent McKinley and what Agent McKinley said to him.

THE COURT: What he say is not hearsay. I said on the grounds of the rule of completeness, I am allowing the question which was answered.

MR. LAIFER: Yes, sir.

Q What was that conversation?

A What the point of the conversation with him was,

Grande-direct

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2 was that he said who it was and I said it was Tony and he got
3 up and I got up and went to the door -- the doorway of my
4 office and he went to my desk and got the phone.

5 Q He, being the agent?

6 A The agent.

7 Q What did you do?

8 A I looked out, down the laundromats.

9 Q What did you see?

10 A I saw the other two gentlemen with Tony.

11 Q What other two gentlemen?

12 A Rothbar and -- I forgot his last name -- the
13 other fellow.

14 Q The individual at this table? Next to Tony,
15 the individual seated at the table there?

16 A Yes.

17 Q Can you recall his first name?

18 A There was Bill and Phil -- so he was Phil.

19 Q Is that the first time you had ever seen these
20 two gentlemen?

21 A That was the first time I ever seen them.

22 Q Where were they?

23 A They were at the front of the laundromat.

24 Q Did Tony go to them?

25 A Tony went to them and they walked out of the

1
2 laundromat.

3 Q They walked out of your laundromat?

4 A Yes, they did.

5 Q Did they return a few minutes later?

6 A Yes, they did.

7 Q Where were you?

8 A I went in the front of the store to look for
9 them and saw their car across the street and knew they were
10 around somewhere.

11 Q What car was that?

12 A The Lincoln. The white Lincoln that Tony had
13 brought up with the pills in it.

14 Q The day before?

15 A The day before and I was looking around for them
16 and they came out of the Pizzeria on the corner, or my corner.

17 Q Just down the block?

18 A Just down the block.

19 Q Who came out; all three of them?

20 A All three of them.

21 Q Were they together?

22 A They were together, yes they were.

23 Q Then what happened?

24 A They came to me. Tony introduced me to them.

25 Q what did he say?

1
2 A He said, "This is Bill and Phil," and we walked
3 directly to the back.

4 Q Back of what?

5 A To the laundromat.

6 Q What happened there?

7 A There, they came in and I told them that that
8 was the gentleman that offered the two cents.

9 Q And who were you referring to?

10 A To Agent McKinley.

11 (Continued on next page)
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Q Where was he located?

A At my desk.

Q This is in the office?

A In the office part.

Q As best you can recall, who was located where in that office?

A Agent McKinley was at my desk at the seat and the office, the desk is very close to the door, so you can only get one person at a time in there and Bill and Phil went in and Tony and I stood out of the door and I didn't remember their names when I introduced them to Officer McKinley and he shook hands with them.

Q The agent?

A Yes. This is the gentleman who offered the two cents. They shook their heads.

Q Who did you say that to; the two cents statement?

A I said it to all of them.

Q Again you are referring to the agent?

A I was referring to the agent. He was the only other person besides these other gentlemen.

Q What happened then?

A Phil didn't like it at all. None of them said a word and he walked out the door.

Q Who did?

1
2 A Phil. I can't think of the last name.

3 MR. LIGHT: Indicating Mr. Arcuri.

4 A The older of the two.

5 Q What about the other individual?

6 A He followed and I said to Phil, "where are you
7 going? Don't you want to talk to him?" He said, "Let him
8 talk to him," referring to Tony, and he walked out the door.
9 The other fellow walked off, out after him. At that point
10 Agent McKinley moved out from his desk and threw Tony inside
11 and told him to stay there and went after the other two.

12 Q They were arrested?

13 A They were arrested.

14 Q Prior to the arrest, back in your office, when
15 you made the statement to these individuals, referring to
16 McKinley as the buyer of two cents each, what, if anything,
17 did William Rothbar do?

18 A He just shook his head.

19 Q How?

20 A As no.

21 MR. LAIFER: Objection as to no.

22 THE COURT: I suppose the answer was from side to
23 side?

24 THE WITNESS: Shook it from side to side.

25 Q What did Arcuri do?

49

Grande-cross

Q Do you recall the words?

A I'm pretty sure it's that, "They're here to pick up the money."

Q Did he say the money for what?

A He didn't say.

Q Now, when that was said, what happened then?

A I says, "Give me five minutes."

Q Well, where did this conversation take place?

A The door to my office. He was standing in the door to my office.

Q Where were the other two men at that time, were they standing there?

A No, they were not.

Q Were they within earshot of this conversation?

A I don't know, I didn't see them at all.

Q Well, please tell the jury where you were standing and where Mr. Sciotto was standing?

A I was behind my desk.

Q Yes?

A And Mr. Sciotto was standing at the door to the room.

Q Approximately how many feet from you?

A About five feet.

Q Approximately as far as I am from you now?

50

Grande-cross

A About that, closer.

Q Was he yelling or talking in a normal voice?

A Normal voice.

Q And you could not see where the other two men were; is that correct?

A Because the laundromat would be that way there is a door going into the other room.

Q Now, there did come a time however, when you looked out of the door; isn't that right?

A Yes.

Q And where did you see the other men at that time?

A I saw Tony approaching by the cigarette coke machine, which is in front of the door.

Q That's 60 or 70 feet away?

A About 50 feet away.

Q Approximately the distance of this Court isn't that right?

A That's right.

Q How many other people were in the store this time, if any?

A There was people, I don't know how many there were people washing.

Q Were there any other people outside of

54

Grande-cross

1
2 was anything else said?

3 A Nothing.

4 Q When you went into the office was anything
5 else said?

6 A Yes.

7 Q By whom?

8 A By me.

9 Q You said something?

10 A Yes.

11 Q Who did you say it to?

12 A To McKinley.

13 Q What did you say to McKinley?

14 A I said this is -- I didn't know their names.

15 Q Well, they had told you it's Bill and Phil?

16 A Yeah, I and -- I introduced Officer McKinley
17 and he had -- He had put a gun under his leg and he gave
18 me -- He gave an excuse that he hurt himself and he couldn't
19 stand and he just reached down and shook hands.

20 Q What happened then?

21 A Well, I told them that this is the guy that
22 offered two cents.

23 Q Well, had they ever said anything to you
24 about pills?

25 A No.

56

Grande-cross

only about six feet.

Q Six feet long and ten feet wide --

THE COURT: No.

MR. LAIFER: I'm sorry.

Q It's ten feet long and six feet wide; is that right?

A And my desk is from the door to the wall, it's about six feet.

Q And they walked in to the office --

A One at a time.

Q One at a time and you said to Agent McKinley --

A I forget their names.

Q "This is Bill or Phil?"

A I didn't say the name because I didn't know.

Q You said to Agent McKinley or to them, you said this is the guy that offered two cents?

A Right. All three of them.

Q To all three of them, but you never discussed pills or money or anything with Mr. Arcuri or Mr. Rothaar; is that correct?

A That's correct.

Q And they never said one word to you about that; is that correct?

A That's correct.

57

Grande-cross

Q Now, did Mr. Rothaar say even one word in that office?

A Nothing.

Q Would it be fair to say that he was in that office less than twenty seconds?

A I would say he was there to give you an estimate, about a minute or so.

Q About a minute or so?

A Because you had to shake hands --

Q You're shaking hands, this is the guy that wants to pay two cents and you turn around and walk out; is that correct?

A Yes.

Q And he shook his head?

A That's right.

Q When he shook his head this way, within this one minute period; is that correct?

A That's correct.

Q Did anyone other than the agent say anything in that one minute period?

A Yes. "Phil Arcuri is his name."

Q Yes?

A He started to walk out and I says, "Where are you going, don't you want to talk to this man?" He said,

"Let him talk," referring to Tony.

Q Well, where was Mr. Rothaar at this time?

A He was behind Phil walking out with him.

Q Did Mr. Rothaar say anything?

A No, he didn't.

Q He walked out?

A He just walked out.

Q Did he do anything?

A Nothing.

Q At any time had you ever seen Mr. Rothaar before?

A No, I never did.

Q Had you ever seen Mr. Arcuri before?

A No, I didn't.

Q At any time did you ever see Mr. Rothaar or Mr. Arcuri handle or touch or do anything regarding these pills?

A No, I didn't.

Q Now, there came a time when they were arrested; is that right, and that's when they walked out of the office, I believe you testified yesterday?

A That's right.

Q Did you tell the agents about a white car at that time?

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Grande-cross/Light

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out of the laundromat after giving the statement, the car was gone?

A Yes.

Q At no time did you ever see Mr. Rothaar in possession of that car?

A No, I did not.

Q You never saw him come out of the car?

A No.

Q You never saw him with any pills?

A No.

Q You never discussed any pills with him?

A No.

Q You never discussed any money with him?

A No.

Q In fact, you were going to throw these pills out, to dump them?

A Yes.

MR. LIGHT: I have no further questions.

CROSS-EXAMINATION

BY MR. PREMINGER:

Q Mr. Grande, you testified that when you first received this shipment you had a conversation with Mr. Sciotto; right?

A Yes.

96

McKinley-direct

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2 A I just asked Mr. Arcuri if he had a license for a
3 car and he said, "No." I found an insurance card for a
4 1972 Lincoln --

5 MR. LIGHT: Your Honor, I object to the
6 manner in which the witness is testifying shrugging
7 his shoulders to give an impression to the jury,
8 which is improper.

9 THE COURT: Try to avoid gestering, agent.
10 Wait for questions also.

11 You're getting something marked?

12 THE CLERK: New York State Insurance
13 Identification Card marked Government's Exhibit 3
14 for identification.

15 Q Agent, I show you what has been marked as
16 Government's Exhibit No. 3 for identification and ask you
17 have you seen that before?

18 A Yes, I have.

19 Q And where have you seen that?

20 A This is the card that I found in Philip
21 Arcuri's wallet during the processing.

22 Q And how are you able to identify that?

23 A My initials are on it and also the date.

24 MR. WOODFIELD: I offer it in evidence at
25 this time.

97

McKinley-direct

MR. LAIFER: Against whom?

MR. WOODFIELD: I offer it against all

MR. LAIFER: Objection on behalf of Mr. Rothaar.

MR. PREMINGER: Same objection.

MR. LIGHT: I will also object.

THE COURT: May I see it for a moment?

(Short pause.)

THE COURT: Will you come to the sidebar for a moment?

(The following occurred at sidebar.)

THE COURT: Do you represent that the white Lincoln has that vehicle identification number?

MR. WOODFIELD: Yes.

THE COURT: It was checked out?

MR. WOODFIELD: And I plan to introduce evidence to so indicate. Your Honor, when I say I offer it for all defendants, this is the same description that we had yesterday. There is a conspiracy count and when further evidence is shown, I would expect that your Honor will give a charge that all these exhibits in evidence may come in just as the statements. I believe that's part of the objection that defense counsel has.

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McKinley-direct

MR. LAIFER: Especially in a case of nature where there hasn't been any showing of conspiracy up to this point.

THE COURT: At this point I'll take it subject to connection. You understand that and that will be my ruling. I will take it subject to connection and subject to your objection. If I am ultimately not convinced that there is enough evidence with respect to the conspiracy count, I will do what I think is called for.

MR. LAIFER: I will withdraw it if your Honor is taking it subject to connection.

MR. PREMINGER: I'll hold mine.

MR. LIGHT: I object on the grounds it is an illegal search. This was an improper arrest of Mr. Arcuri. There was no probable cause for an arrest. Mere presence at the scene is not enough and they found evidence afterwards.

THE COURT: Let me say this; we went through that, didn't we, in the suppression hearing?

MR. WOODFIELD: Yes, your Honor.

MR. LIGHT: No, we did not go through this. This card was on his person.

MR. LAIFER: There are things that came out

99

McKinley-direct

at trial that surprised me. We thought there was going to be a lot more.

THE COURT: I don't know yet. We haven't heard it all. I don't know what Mr. Woodfield has up his sleeve for the moment. This can be received.

MR. LAIFER: Did your Honor say subject to connection?

THE COURT: Yes.

(The following occurred in open Court.)

THE CLERK: Government's Exhibit 3, received in evidence.

(Continued on next page.)

McKinley-cross/Laifer

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A You're talking about Mr. Grande?

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Q Yes, --

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A No. Mr. Sciotto left first.

5

Q And then Mr. Grande left, also?

6

A Then Mr. Grande went outside and looked outside.

7

Q Did you look outside of the office, too?

8

A No, I did not state I looked out of the office.

9

Q I didn't ask you what you stated. I am asking

10

what you did.

11

Did you look out of the office?

12

A Yes, I did.

13

Q Did you see Mr. Rothaar or Mr. Arcuri in the

14

laundromat at the time Mr. Sciotto came in, the first time

15

Mr. Sciotto came in?

16

A No, I did not.

17

Q And then Mr. Grande went out to look for these

18

men; is that right?

19

A No, that's not right.

20

Q He didn't do that?

21

A What he did first, after looking outside of the

22

office is to tell me that in addition to Mr. Sciotto --

23

MR. LIGHT: I object to what Mr. Grande told him.

24

THE COURT: You're objecting? Well, are you or

25

aren't you?

McKinley-cross/Laifer

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MR. LIGHT: Come here.

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MR. LAIFER: Yes.

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(Short pause.)

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THE COURT: Do you want an answer to the question?

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MR. LAIFER: Yes, your Honor, yes.

8

THE COURT: You may continue.

9

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11

A What Mr. Grande did was look outside the office and then tell me in addition to Mr. Sciotto there were two other guys with him at that time.

12

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Q Now, at that time, sir, how many people were in the laundromat?

14

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A I just finished telling you I was in the office. I had not gone out of the office of the laundromat.

16

17

Q Excuse me?

18

19

A I did not see who was in the laundry area.

Q You walked in one or two minutes before, didn't you?

20

21

A Right.

22

Q And as you walked through you have to pass the washing machines and dryers?

23

24

A Certainly.

25

Q How many people were in there at that time?

A At that time, I don't know. Maybe -- I don't

McKinley-cross/Laifer

8 1
2 know. Two, three. I really didn't pay any attention to
3 anyone in there.

4 Q And then there came a time when Mr. Grande and
5 Mr. Sciotto left; isn't that right? And you were all alone?

6 A There was a time when Mr. Grande had left.

7 Q And you were all alone; is that right?

8 A Yes, I was.

9 Q And how long were you alone until Mr. Grande
10 came back?

11 A Three, four minutes. About three or four
12 minutes.

13 Q When he came back he had Mr. Sciotto with him;
14 is that correct?

15 A Yes.

16 Q And Mr. Rothaar and Mr. Arcuri?

17 A Yes.

18 Q And that was a three- or four-minute period?

19 A After Sciotto had left.

20 Q From the time Mr. Grande left, Mr. Sciotto left,
21 until they returned?

22 A Three, five minutes, somewhere around there.

23 Q Now, Agent McKinley, what was the total time
24 that you observed Mr. Rothaar before you were arrested, total
25 time?

McKinley-cross/Laifer

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A Oh, I'd say -- I'd say no more than a minute.

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Q Did Mr. Rothaar utter one word to you before he

4

was arrested?

5

A No.

6

Q Did he utter one word to any other individual

7

before he was arrested?

8

A Not to my knowledge.

9

Q Did he do anything?

10

A Yes.

11

Q What did he do?

12

A He indicated to me a participation.

13

Q What did you do? What did he do? Tell the jury.

14

A Mr. Grande kept repeating to Sciotto in front

15

of Rothaar and Arcuri, who had been in and out of the office,

16

that I was the individual who wanted to buy the pills. He

17

repeated this many times.

18

Q Did Rothaar say one word when he repeated this?

19

A No, he just shook his head side to side.

20

Q Did he do anything other than shake his head?

21

A No.

22

Q And this was in less than one minute; is that

23

right? And would it be fair to say that you arrested him

24

after observing him one minute, you were watching other

25

people during that one-minute period; isn't that right?

McKinley-cross/Laifer

101

2 A Well, I was watching him and Sciotto.

3 Q And Arcuri, isn't that right?

4 A Well, Arcuri, I saw when he stuck his head in
5 around in front of the office.

6 Q As a matter of fact, you only saw Arcuri for
7 about five seconds?

8 A Yeah, probably about that, sure.

9 Q But you were watching Sciotto for part of that
10 time; isn't that right, is that right, part of that minute?

11 A Sure.

12 Q Fifteen or twenty seconds of the minute you
13 watched Sciotto?

14 A I can't break down how long I watched Sciotto.

15 Q And part of that you were even watching Grande;
16 wouldn't that be fair to say?

17 A I don't know who I was watching at a particular
18 time.

19 Q How much total time did you observe Mr. Rothaar --

20 MR. WOODFIELD: I object, your Honor. I think
21 we have gone over this. He answered he can't divide it
22 up into one minute.

23 MR. LAIFER: I will withdraw it.

24 Q At any time did you ever see Mr. Rothaar touch
25 or handle any pills?

McKinley-cross/Laifer

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A No.

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Q At any time did you ever hear Mr. Rothaar

4

discuss touching, handling, distribution of any pills?

5

A No.

6

Q At any time did you see Mr. Rothaar pass money,

7

receive money?

8

A No.

9

Q At any time did you hear Mr. Rothaar discuss

10

the passing or receiving of money?

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A No.

12

Q At any time did you hear Mr. Rothaar in

13

conversation with Mr. Grande?

14

A No.

15

Q At any time did you hear Mr. Rothaar in

16

conversation with Mr. Sciotto?

17

A They may or may not have been talking; I don't

18

recall, out of the office.

19

Q At any time did you ever hear him talk with

20

Mr. Acuri, did you say anything to Mr. Arcuri?

21

A Who?

22

Q Mr. Rothaar.

23

A Not that I know of.

24

MR. LAIFER: No further questions.

25

Thank you, Judge.

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Guillen-direct

-voir dire

THE COURT: You want a voir dire or an objection?

MR. LAIFER: I'll take the voir dire and then the objection.

THE COURT: You want a voir dire?

MR. PREMINGER: I do too.

THE COURT: Remember, it's a voir dire and not cross-examination.

MR. LAIFER: Just upon this issue.

THE COURT: I'll let you go first.

MR. LAIFER: Thank you very much.

VOIR DIRE EXAMINATION

BY MR. LAIFER:

Q Agent Guillen, there are three defendants at the table; did you ever see either one handle or touch --

MR. WOODFIELD: Objection.

THE COURT: What was the question?

MR. LAIFER: Did he ever see any of the defendants handle or touch any of these exhibits --

MR. WOODFIELD: I object.

THE COURT: I think that is cross-examination.

MR. LAIFER: It's a question of possession and the basis for it. I can't see any basis for the admission.

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Guillen-voir dire

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2 THE COURT: Wait a minute. That's cross-
3 examination. Voir dire is usually employed to test
4 the authenticity of something that is being offered
5 in evidence.

6 MR. LAIFER: Most respectfully the question
7 is is it connected with any of the defendants, they
8 are charged with intent to distribute --

9 MR. WOODFIELD: I object to these comments.

10 THE COURT: You'll have an opportunity on
11 cross-examination to ask this agent those questions.

12 MR. LAIFER: May we approach the sidebar,
13 Judge?

14 THE COURT: Yes.

15 (Sidebar.)

16 MR. LAIFER: Most respectfully, sir, the
17 whole purpose of the voir dire is to determine
18 whether or not there was any connection to these
19 defendants. There is no other purpose.

20 MR. PREMINGER: It goes to the identity,
21 not to the weight, but to the identity itself. I
22 think a voir dire is proper not to discuss whether
23 or not they can be identified, we saw them with
24 anybody, but whether or not in the first instance
25 they can be admitted as properly connected.

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Guillen-voir dire

MR. WOODFIELD: May I be heard?

THE COURT: Yes.

MR. WOODFIELD: I'm going to request when we get to the charge, I think your Honor would charge this, because it's proper constructive possession in this case. Point 2 as we discussed yesterday, although they continued to object to it, there is a conspiracy count and I am saying with regard to whether there is a conspiracy and it is proper, if there is an objection on that ground they should be admitted subject to connection. They don't have to have physical possession.

MR. LAIFER: The Government cannot even show constructive possession by the evidence so far. So far as Mr. Woodfield's conspiracy, under every prosecution from time immemorial uses the conspiracy count for the basis of everything. It's the darling of the prosecution. In the instant case there is not a scintilla of proof of any crime, agreement between these defendants.

MR. WOODFIELD: But I don't think that is the point.

THE COURT: Wait a minute, wait a minute. Don't go so fast. My recollection is that Grande

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Guillen-voir dire

1 said that Sciotto got these from somebody, correct?

2 MR. PREMINGER: Not these.

3 MR. LIGHT: Conspiracy after he was arrested --

4 THE COURT: I'm not talking about what
5 Grande said, but what Sciotto told him, do you
6 understand? Sciotto is a defendant on trial.

7 MR. LAIFER: Correct, sir.

8 THE COURT: I'm not saying that anything
9 that Grande did, acting as an agent, any declaration
10 of his, you understand? He's now in the role of a
11 witness to something. He heard Sciotto say that he
12 got these pills from somebody.

13 MR. LAIFER: From whom?

14 THE COURT: Wait a minute.

15 MR. PREMINGER: Excuse me, Judge. Just a
16 minute, he didn't say these pills. He didn't say
17 these pills.

18 MR. WOODFIELD: It goes to the weight, your
19 Honor.

20 THE COURT: Let me say he got the merchandise --

21 MR. PREMINGER: He got some pills.

22 MR. LAIFER: How can that be admissible
23 against our clients?

24 THE COURT: Wait a minute. Then Sciotto does
25

Guillen-voir dire

in fact deliver from a car, he drives up in, that's Grande's testimony. These were delivered.

MR. PREMINGER: He never identified these, Judge.

THE COURT: Wait a minute. Well, then maybe the Government has to call him back.

MR. PREMINGER: Maybe they do. I'm saying Grande never identified these pills.

MR. LAIFER: As far as I'm concerned and our clients are concerned they have not in any way been connected --

THE COURT: I'm as interested as you are in trying to find out what the Government's case is on conspiracy.

MR. LAIFER: If you let something like this into evidence on the theory that it's going to be connected later on --

THE COURT: I might throw it out.

MR. LAIFER: This is really in effect the heart of the case. Why doesn't your Honor sustain the objection until they actually can prove a conspiracy, if ever? They certainly --

THE COURT: Any conspiracy is subject to the introduction of evidence of any one kind or

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Guillen-voir dire

another. Now, the fact of the matter is, it's true, that this was really taken from the possession of Grande. That's really what it was. He was pushing four cartons on a hand cart. Three cartons in his office.

MR. LAIFER: There is proof of that against --

THE COURT: He testified he was not a source of it. Someone did in fact deliver it. That's Grande's statement.

MR. LAIFER: That's what he says.

THE COURT: All right, and he says that one of these defendants, Sciotto, was the man who approached him and brought these to his place of business in a car, in a certain car, you know, he was offered them for sale.

MR. LAIFER: Where is the connection to Arcuri and Rothaar?

THE COURT: Wait a minute. When he looked at the stuff, this stuff is no good, take it away, I wouldn't pay you two cents. So, Sciotto says I got to go back in effect and see my boys or boy.

MR. LAIFER: My boy.

THE COURT: Whatever.

MR. LAIFER: It's very important, in the

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Guillen-voir dire

singular.

MR. WOODFIELD: Ridiculous.

MR. LAIFER: And the tape is in the singular.

THE COURT: I heard that, I recollect that. Even if we say my boy, it only takes two to make a conspiracy.

MR. LAIFER: But there's no proof of any conspiracy.

THE COURT: Just a minute, just a minute. As you know and I know that when a jury is instructed on conspiracy, they are told you don't have to sit down and write out a letter that we're going to plan something.

MR. LAIFER: There must be some connection.

THE COURT: There has to be a connection, but the connection is -- This is the basic question. The Government has to persuade the Court at some point that there is at least enough evidence to warrant the belief that there was in fact some kind of an understanding here with respect to these pills and I'm not sure whether the Government has succeeded.

MR. WOODFIELD: I'm sorry?

THE COURT: What I'm saying is at the moment

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Guillen-voir dire

there is testimony and there are these facts, without prearrangement, without real prearrangement based on the evidence, Sciotto walks in this place with two men. The other two men, and he says They're here to get the money.

MR. LAIFER: For what?

THE COURT: For merchandise.

MR. LAIFER: The evidence in the case, the agent testified that he presumed it was for that purpose. People are not arrested for that.

MR. WOODFIELD: Isn't this a jury argument?

THE COURT: We can't bind ourselves to what common sense says, money for what, they were talking in terms of two cents, five cents.

MR. LAIFER: Who --

MR. PREMINGER: Judge, \$500, according to the tape or according to the testimony that Grande gave, on the 19th, was that Sciotto says according to Grande, if he's to be believed, that he's in a bind because the guys that gave him the stuff don't want to know that it's no good. They want their money. So, this \$500 is not for the pills. This is more or less a shakedown by whoever gave him those pills.

Guillen-voir dire

But, the question on this particular evidence, Judge, I object to it on the grounds that there is no connection. If these were the boxes taken from Grande, Grande has identified and if he's offering this box as the box that Grande got from Sciotto, Grande's got to identify them. This witness is not competent to testify to both.

MR. WOODFIELD: Let me be heard, that's not true. Just as I can prove a case without introducing drugs. I can prove that the pills came from Sciotto from circumstantial evidence and the circumstantial evidence is overwhelming. Grande says he got it and it wound up the next day the agents arrested him --

MR. PREMINGER: The testimony was that these two boxes were not sealed.

MR. LAIFER: Grande said the boxes he had were sealed and the agents testified --

THE COURT: You may have to recall Grande.

MR. WOODFIELD: Your Honor, I think most respectfully you're quite wrong on that.

MR. LIGHT: The U.S. Attorney can try his case the way he sees fit.

MR. LAIFER: He said he sealed them.

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Guillen-voir dire

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3 THE COURT: Circumstantial evidence, you can
4 have constructive or actual. I never heard of cir-
5 cumstantial.

6 MR. LAIFER: Most respectfully, there is, I
7 would say, your Honor, quite the opposite. The
8 evidence is overwhelming as to lack of evidence on
9 any conspiracy.

10 THE COURT: I do agree at the moment in a
11 way upon reflection. I think it would have been
12 important that the witness to whom the boxes were
13 delivered identify them as the boxes he got.

14 MR. WOODFIELD: Your Honor, I think for a
15 moment what could he have been able to say? He
16 didn't initial the boxes like the agents.

17 THE COURT: Whether he does or not he can
18 certainly say these are the boxes I got.

19 MR. LAIFER: He couldn't, because the ones
20 he got were sealed and the agent says they weren't
21 sealed.

22 MR. PREMINGER: The fact is I think it's
23 incumbent on the Government to show control. That
24 is to prove --

25 THE COURT: In a conspiracy case, what I
started to say, but never got a chance to finish,

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Guillen-voir dire

in a conspiracy case as you well know all kinds of evidence is admitted subject to connection.

If the connection is not made, then the jury is instructed to disregard it or the Court may very well throw the conspiracy claim out the window.

MR. PREMINGER: That's not the basis of my objection.

MR. LIGHT: That's the basis of your objection. If the Judge wants to order it subject to connection. Let the Government try his own case. The Judge does what he thinks he has to do according to the law.

MR. WOODFIELD: Just with regard to this latter point, Grande can only say that those boxes appear similar to the ones that were in my possession when I was arrested. There is no sense in calling him back.

THE COURT: I don't care how much weight you may attach to his testimony, but he is the man to whom the boxes were brought.

Now, you just can't tell me the very fact that he hasn't testified to that might well lead the jurors -- Well, I'll tell you very candidly with some doubt in their mind as to where the boxes

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Guillen-voir dire

came from. Right at the moment it's a matter of speculation. On the record he says I got them sealed and somebody else says I arrested somebody with a hand truck and --

MR. WOODFIELD: It goes to the weight.

MR. LAIFER: More than that, Judge.

THE COURT: You're talking about a conspiracy here.

MR. LAIFER: Judge, they use that conspiracy in every case. They use it and they use it and they use it. Most respectfully I object, because there is no connection.

THE COURT: I will overrule your objection, because I'm taking it subject to connection.

MR. LIGHT: Just for the record I will object.

MR. PREMINGER: I have an objection. This is subject to identification.

THE COURT: Subject to connection.

MR. LAIFER: Would you tell the jury these are taken subject to connection?

THE COURT: Yes.

(The following occurred in open Court.)

THE COURT: Members of the jury, in a case

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Guillen-voir dire
-direct

such as this, where we have a charge of conspiracy, it is very often the case that certain evidence will be admitted into evidence on what is really a provisional basis; that is subject to the evidence being connected to one or more of the defendants. Do you understand?

So, at this time I'm overruling the defense's objection and allowing the Government to introduce these boxes into evidence, subject to some later connection with one or more of the defendants being established.

THE CLERK: Government's Exhibits 4 through 12, received in evidence.

DIRECT EXAMINATION

BY MR. WOODFIELD:

Q Agent Guillen, did you and Agent Cavuto attempt to obtain a count of the number of pills?

A Yes, we did.

Q In these exhibits?

A Yes, we did.

Q Can you tell us how you did that?

A We totaled each one of the bottles in the boxes and on each bottle there is a label determining how many dosage units of phenobarbital were in each one of the

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1
2 A Glove compartment.

3 Q I show you what has been marked as Govern-
4 ment's Exhibit 18 for identification and ask you if you
5 can identify that?

6 A Yes, I can.

7 Q Your initials are on that also?

8 A Yes.

9 Q Where did you obtain that from?

10 A The glove compartment of the white Continental.

11 Q I show you what has been marked as Govern-
12 ment's Exhibit 19 and ask you if you can identify that?

13 A Yes, I can.

14 Q How are you able to do so?

15 A My initials are on it.

16 Q Where did you find that?

17 A In the white Lincoln Continental.

18 MR. WOODFIELD: At this time, your HONOR, the
19 Government moves to offer into evidence Exhibits
20 14 through 19.

21 MR. PREMINGER: Judge, same objection regard-
22 ing the connection.

23 MR. LAIFER: Mr. Rothaar objects on the
24 grounds of connection.

25 THE COURT: All right. Let them be received

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Guillen-direct

in evidence subject to connection.

MR. LAIFER: Subject to connection?

MR. WOODFIELD: And I'd like to pass them to the members of the jury, your Honor.

MR. LIGHT: Your Honor, it's subject to connection and all the defendants --

THE CLERK: Government's Exhibits 14 through 19, received in evidence.

THE COURT: Let me see them as you mark them.

(Short pause.)

MR. WOODFIELD: Your Honor, I request that these be passed amongst the jury?

THE COURT: You may circulate it.

MR. WOODFIELD: I have no further questions, your Honor.

MR. LIGHT: Your Honor, they're being offered subject to connection, should we show them to the jury at a later date? The jury would have already seen the exhibits and --

MR. WOODFIELD: I would stress my request, your Honor, to have them distributed at this time.

MR. LAIFER: But they are only offered --

THE COURT: I'll let the jury look at them.

MR. LAIFER: You want me to wait until the

1
2 please?

3 THE CLERK: Plastic envelope and contents,
4 marked for identification as Government's Exhibit
5 20.

6 MR. LIGHT: Your Honor, may we have a sidebar
7 before we show this to the witness?

8 (The following occurred at sidebar.)

9 MR. LIGHT: Your Honor, at this time Mr.
10 Woodfield will attempt to show the agent a
11 cellophane envelope with the contents of some kind
12 of a hat or some kind of gloves. We did not go
13 into this on direct examination or cross. At this
14 time I think it's inflammatory to try to suggest to
15 the jury that this was the car and these guys are
16 stick-up men or something along those lines. There's
17 no other reason that this is being shown. Judge,
18 look at the envelope?

19 THE COURT: All right. There is a rule here
20 that you hear the other side. So?

21 MR. WOODFIELD: Your Honor, I intend to
22 offer them and that bottle of pills was found in
23 the glove compartment. There has been a big issue
24 here about who is connected to that automobile.
25 One of the points of defense counsel, which they

1
2 have raised is that bottle which was found in the
3 glove compartment was submitted for fingerprints
4 analysis and no fingerprints were found. I'm quite
5 sure that is a point they will develop into on
6 summation.

7 I will introduce these rubber gloves
8 found in the car and introduce them and argue to
9 the jury that there were no fingerprints because of
10 the rubber gloves and they can draw the inferences
11 that he handled them with the rubber gloves.

12 MR. LIGHT: I didn't raise any point about
13 it.

14 MR. LAIFER: That's not even --

15 THE COURT: Whatever you did --

16 MR. LAIFER: But Judge, the theory of the
17 Government's case is that these were transferred
18 by Mr. Sciotto. Because the other guy had a bad
19 shoulder and Mr. Sciotto -- There is no indication
20 he is alleged to have been wearing these gloves
21 and no fingerprints were removed --

22 MR. WOODFIELD: That's the very point, no
23 fingerprints were found.

24 MR. LAIFER: Why don't you go to the
25 defendant's home and get a search warrant. --

1
2 THE COURT: I can't say that in the light of
3 the potential argument that you're developing, that
4 the Government shouldn't have an opportunity to
5 show that there is also another reason why --

6 MR. LIGHT: It's so far fetched.

7 THE COURT: You bring these things up and
8 you open doors.

9 MR. LAIFER: The Government opened the doors
10 too. They opened the door about the car and
11 apparently we couldn't go into the informant's
12 status --

13 THE COURT: All I'm saying is --

14 MR. PREMINGER: I haven't closed the door on
15 the informant's status. As I said I'm going to ask
16 the Government to develop the information on that.
17 We'll have a good long look at what it is and if it's
18 something, I think we should go into --

19 MR. LIGHT: Your Honor, this is an inference
20 upon an inference upon an inference. They found
21 material in the car with Anthony Scotto's name --

22 THE COURT: They can make an argument to the
23 jury, because they didn't find fingerprints on the
24 boxes, none of these defendants could possibly have
25 touched them. Well, I don't know --

1
2 MR. LIGHT: They don't have to touch it, the
3 theory of the Government's case is a conspiracy.

4 THE COURT: I understand, but there is also
5 possession.

6 MR. LIGHT: So, they put in the invitation
7 to the Bar Mitzvah. He put in the tickets, he put
8 in a battery card with my client's name on it.

9 THE COURT: It will be largely for the jury,
10 if it gets to it, to determine whether or not if
11 you make such an argument in summation, if you don't
12 make it, then the Government shouldn't have anything
13 to say about it.

14 MR. LIGHT: The Government is offering the
15 hat and they're going into evidence --

16 MR. LAIFER: Are we supposed to lift hair
17 prints too?

18 MR. LIGHT: Can we get a ruling before it's
19 shown to the witness or to the jury?

20 MR. LAIFER: On behalf of Mr. Rothaar, I
21 respectfully object.

22 MR. LIGHT: I want to look at it.

23 THE COURT: He's not going to mention any-
24 thing about the hat.

25 MR. WOODFIELD: I'm not drawing that inference.

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Guillen-redirect

I'm basing it on reasonable grounds --

THE COURT: I'll let you go into that.

MR. LAIFER: On behalf of Mr. Rothaar, I respectfully state there is no conspiracy that has been established and there is no connection. There is no actual or constructive control that has been established --

MR. WOODFIELD: You have a continuing objection and --

THE COURT: I'll give them a continuing objection.

MR. LAIFER: Would you give a limiting instruction?

THE COURT: I don't want to keep doing that over and over again.

MR. LIGHT: Judge, the reason that is going to be offered is based upon the possibility that we may refer to it in our summations, if it goes that far, it referred to the fingerprints. I never questioned about the fingerprints. This car evidently --

THE COURT: You may have to talk to one of your colleagues about it. Because at this point --

MR. LIGHT: Once the gloves and hat are

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Guillen-redirect

introduced into evidence, that is attributable to a stick-up man.

THE COURT: No.

(The following occurred in open Court.)

THE COURT: Has it been marked for identification?

MR. WOODFIELD: Yes.

THE COURT: What's the number on it?

MR. WOODFIELD: 20.

REDIRECT EXAMINATION

BY MR. WOODFIELD:

Q Agent Guillen, I show you what has been marked for identification as Government's Exhibit 20 and ask you if you can identify that?

A Yes, I can.

Q And how are you able to do so?

A By my initials on the glove and plus the date.

Q Where did you first see those exhibits?

A In the glove compartment of the '72 white Lincoln Continental.

MR. WOODFIELD: I offer them into evidence at this time.

MR. PREMINGER: Objection, no connection

whatsoever.

MR. LIGHT: I would object also.

THE COURT: I'm going to allow it in.

MR. LIGHT: If you had a coat, we're not going to put the coat in evidence --

THE COURT: I'm permitting it in evidence subject to connection as I've been doing with most of the exhibits --

MR. PREMINGER: Judge, there is no possibility this could be used in furtherance of a conspiracy.

MR. WOODFIELD: I object. If there is further argument I prefer it be at sidebar.

THE COURT: As I said, I think we fully explained the reasoning for it at the moment. Go ahead.

THE CLERK: Government's Exhibit 20, received in evidence.

MR. WOODFIELD: May I hold it up for the members of the jury, instead of passing it around?

MR. LAIFER: They can't see what it is.

MR. WOODFIELD: Can I ask the agent to tell us what they are --

MR. LIGHT: I object, it speaks for itself.

MR. WOODFIELD: Then I request they be passed

amongst the jury.

THE COURT: Do you have any further question.

MR. WOODFIELD: No further questions.

THE COURT: Anybody have any further question

MR. LAIFER: Excuse me, if I may, your Honor?

(Whereupon, Government's Exhibit 20 was
passed amongst the jury.)

THE COURT: Go ahead, Mr. Laifer?

MR. LAIFER: The jurors are still looking.

THE COURT: Let's not wastatime here.

MR. LAIFER: All right.

CROSS-EXAMINATION

BY MR. LAIFER:

Q Agent Guillen, when did you find this item
that the jury is looking at?

A The first time I saw it was the 21st of May.

Q And that was in the same car?

A In the glove compartment, yes.

Q Had you ever seen it before?

A No, I had not.

Q Do you know how long it had been in there?

A No, I do not.

MR. LAIFER: Nothing more. Thank you.

THE WITNESS: Thank you, your Honor.

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Baker-direct

(The following occurred in open Court.)

MR. WOODFIELD: I'll offer it in evidence
at this time, your Honor.

THE COURT: All right.

THE CLERK: Government's Exhibit 21, received
in evidence.

DIRECT EXAMINATION

BY MR. WOODFIELD:

Q Agent Baker, this card, looking at it,
contains numbered questions on the front and back; is
that correct?

A That's correct, yes.

Q And there are five; is that correct?

A Yes.

Q Five questions and there is other wording
on this card?

A Yes.

Q Did you read everything on this card to the
defendant Arcuri at the time you so stated?

A Yes, the complete card.

Q And did he indicate that he understood what
you were reading to him?

A Yes, he did.

MR. WOODFIELD: I have no further questions,

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Pagan-cross

on this.

MR. WOODFIELD: That is correct.

THE COURT: Well I will rule on that then.
Just mark them for identification.

THE CLERK: A plastic envelope with a set
of keys is marked Government's Exhibit 22 for
identification.

CROSS-EXAMINATION

BY MR. PREMINGER:

Q Mr. Pagan, what is the procedure by which
agents -- Do they all drive the same vehicle all the time?

A No, sir, they don't. When someone needs a
car they requisition it. The cars are assigned by our
boss. The top man, the original director.

Q He gets a requisition from an agent that
he needs a car?

A No, sir. The agent requisitions the auto-
mobile. It is requisitioned through a supervisor.

Q Did the same agents drive the same cars all
the time?

A No, sir.

Q So this particular car could be driven by
different agents at different dates?

A At different dates, different times.

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Cavuto-voir dire
-direct

Q That is being offered now?

A That is correct.

MR. LAIFER: Your Honor, I respectfully
object not only on the ground of connection, but
on the question chain of custody.

THE COURT: Overruled.

MR. PREMINGER: Let the record show I object
also on the same ground.

THE COURT: Government's Exhibit 13 is
received in evidence.

MR. LIGHT: I note my objection if it was
not noted earlier.

THE COURT: Overruled.

DIRECT EXAMINATION

BY MR. WOODFIELD:

Q Agent Cavuto, did there come a time after
May 21, 1976, when you had occasion to speak to Neil Pagan?

A Yes.

Q Do you recall approximately when that was?

A The second week in July.

Q What if anything, did you say to Neil Pagan?

MR. LAIFER: I object on the ground of
being self-serving and hearsay.

MR. PREMINGER: I object. It is a conversa-
tion not in the presence of the defendants.

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Cavuto-direct

testimony by other witnesses that there was no control over these cars. They could be used by many, many agents.

THE COURT: I am going to overrule your objection and allow the keys into evidence subject to the connection.

MR. LAIFER: We all have an exception, is that correct?

THE COURT: Yes.

THE CLERK: Government's Exhibit 22 is received in evidence.

Q Agent, did there come a time when the 1972 white Lincoln was seized?

A That is correct, yes.

Q When a vehicle is seized do you take identity information of that vehicle?

A A seizure report has to be prepared.

Q Is that contained information of that vehicle?

A Yes.

Q Now with regard to the white 1972 Lincoln, was the vehicle identification number obtained from that vehicle?

A Yes, it was.

1
2 A Yes, it is.

3 MR. WOODFIELD: I have no further questions.

4 THE COURT: That is all. Thank you. You
5 may step down.

6 MR. WOODFIELD: Your Honor, at this time
7 the Government rests.

8 THE COURT: All right. Members of the jury
9 I think I will let you go to lunch at the present
10 time. Will you please come back at 2 o'clock.

11 (At this point the jury leaves the Courtroom.)

12 MR. LAIFER: Your Honor, after so much --
13 the Government is resting. Based upon the sidebar
14 we had, Judge, concerning these keys and the Court's
15 indication that Mr. Dowd should be called --

16 THE COURT: I don't know whether you are
17 shocked or over joyed.

18 MR. LAIFER: A little bit of both.

19 MR. LIGHT: They rest. Do we want to make
20 our motion now?

21 MR. LAIFER: May we reserve our motion on
22 the prima facie case and may we rest and make our
23 motion --

24 MR. LIGHT: At the end of the entire case?

25 THE COURT: I do not believe you can allegedly

1 204 do that.

2 MR. LAIFER: Would you just hear argument
3 then?

4 MR. WOODFIELD: They called the witness agent
5 through Agent Cavuto so --

6 MR. LIGHT: Could we have a moment. Let us
7 get our strategy together.

8 MR. WOODFIELD: He was their witness.

9 MR. LIGHT: Your Honor, on behalf of all
10 three defendants, after the Government rests, we
11 make the motion to dismiss that the Government
12 failed to make out a prima facie case.

13 MR. LAIFER: We reserve all argument.

14 THE COURT: Well, you are just making the
15 motion?

16 MR. LIGHT: Right.

17 MR. PREMINGER: You made that for all three
18 defendants.

19 MR. LIGHT: Yes, sir.

20 THE COURT: Well, I am afraid though that
21 it is my obligation to determine that motion. I
22 think if I don't, you waiver it. I have to determine
23 your motion in the light of any evidence that comes
24 out on your case. That is the rule.

25 MR. WOODFIELD: I believe that is correct.

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1 THE COURT: You are willing to accept that?

2 MR. LIGHT: We made a motion to dismiss --

3 MR. LAIFER: On the ground that the Government
4 has failed to make out a prima facie case.

5 THE COURT: You said something about reserving
6 argument.

7 MR. LAIFER: No, I am talking about the end
8 of the entire case.

9 THE COURT: Of all the defendants, right?

10 MR. LAIFER: That is correct.

11 THE COURT: Dismissed on the failure to make
12 out a prima facie case --

13 MR. LAIFER: As a matter of law --

14 THE COURT: Well, let me hear you sum up
15 briefly because as I tried to tell you yesterday,
16 I wanted you to think about --

17 MR. LIGHT: We are prepared to argue at the
18 end of the entire case.

19 THE COURT: Well, are you going to put some
20 witnesses on?

21 MR. PREMINGER: We intend to rest, Judge.

22 MR. WOODFIELD: I believe your Honor it is
23 somewhat of a charade.

24 MR. LIGHT: We asked to make the motion at
25 the end of the entire case.

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MR. WOODFIELD: Your Honor is quite right, he has to rule on the motion. He cannot reserve his decision.

MR. LIGHT: We will wait for the decision and rest and wait for the entire case.

MR. PREMINGER: Beyond a reasonable doubt as --

THE COURT: Let me say this. Under the rules, you know I don't know what the rules still are under the State system, but the motion is basically a motion for a judgment of acquittal.

MR. LIGHT: That is all we meant.

THE COURT: That is the one I suppose you mean.

MR. LIGHT: That is the one we mean.

THE COURT: Motion for directed verdict are abolished. Motion for judgment of acquittal shall be used. The Court, on motion of the defendant or of its own motion shall order the entry of judgment of acquittal if one or more offense is charged in the indictment or information after the evidence on either side is closed. In other words, the Government has closed its case and the only motion before the Court is whether you are entitled to judgment of acquittal on the ground that the evidence is insufficient to sustain a conviction of the offense or

207 offenses charged. Do you understand that?

MR. LIGHT: Yes.

THE COURT: So that is what we are talking about. It is my understanding that it is possible to make a motion for judgment of acquittal, but in view of the fact -- Let me put it this way, that you have indicated that you do not intend to offer any evidence. I don't want to go through an idle exercise. You are entitled to a judgment of acquittal if the evidence at the end of the entire case is insufficient or not, at which case it goes to the jury.

Now, let me hear you give me in a nut shell what you say are the main points.

MR. PREMINGER: Judge, now is this motion being made at the end of the entire case?

THE COURT: My point is, I am saying to you inasmuch as you have already indicated that you do not propose to put in a case, I am suggesting that we now confine ourselves to whether or not on the theory that the evidence of both sides is closed, the evidence is insufficient to go to the jury.

MR. PREMINGER: Is that what it is now? The Government indicates they rested for real.

THE COURT: For one or the other or both on

1 208 the counts you understand?

2 MR. PREMINGER: Yes, Judge. I can address
3 myself to that, but I want to be sure because the
4 statement was made by the Government that we had
5 put in a case by making one of the witnesses our
6 own. Now, I want to be sure that the Government
7 has rested in totality and does not intend to offer
8 rebuttal.

9 THE COURT: The Government has indicated
10 there is no rebuttal.

11 MR. WOODFIELD: That is correct.

12 MR. PREMINGER: In that event, I would move
13 firstly, to strike from evidence everything that
14 was taken subject to connection on the ground that
15 nothing was connected. That no evidence was elicited
16 to show a conspiracy.

17 Number two, with regard to Exhibit 13
18 and with regard to the evidence of the identifica-
19 tion of phenobartital, there was no testimony
20 elicited showing control of these items. As a
21 matter of fact, the last witness of the Government,
22 more or less, wound the gap of the control when
23 he testified -- And I am talking about the case
24 agent, when he testified that he took the label,
25 the merchandise involved in this case, the

1 209 phenobarbital on the 25th of May, five days after.
2 He labeled them then for the first time. The
3 bottles.

4 Now, I don't care about the cartons.
5 The cartons are not the evidence, but the bottles.
6 He says he labels them then for the first time and
7 the cartons were sealed only by a small bit of tape
8 on the top and that anybody could have taken some-
9 thing in it and something out because that tape is
10 easily replaced.

11 Now, Judge, this is not the type of
12 control of evidence that is crucial. The Government
13 must show control and identity of any controlled
14 substance from the time it is taken from the
15 defendant until the time it is introduced into
16 Court. That is why they go through all this
17 trouble of having all these plastic bags sealed
18 and unsealed. Now they are coming into Court and
19 there is a gap on these articles. Not on, there
20 is a gap. These products, this phenobarbital, in
21 spite of your Honor's directions, counsel he should
22 bring Grande back to identify them, but he has not
23 done so.

24 So what you have is Mr. Grande testify-
25 ing there was some phenobarbital or pills that he

1 210 took, although he never tested them. We don't know
2 what he took, because this is a Court of law and a
3 witness could not be heard who is not qualified to
4 say what they are. He did not make them and he said
5 they were sealed cartons.

6 Now, the Government comes in with
7 unsealed cartons and they don't put Grande on to say
8 that these are the cartons he gave them. They just
9 come in and say Well, these are the cartons we took.
10 He doesn't say these are the cartons he took from
11 them. Where is the connection? There is no connec-
12 tion to these defendants and there is no connection
13 between Grande, Sciotto and there is no connection
14 between the Government agents themselves.

15 They lack the continuity to show
16 control and exclusivity because the product has
17 got to be held by them beyond any doubt whatsoever,
18 that they were held and the chain must be continuous.
19 Judge Bartel has said many times that if there is
20 a break in that chain, that evidence is not admitted
21 and that is fundamental and basic.

22 I get upset about it, Judge, because
23 the casual matter and the -- matter that there was
24 presented in this Court, that one would think that
25 just because they were brought in that they are

1 211 admissible. But the Government has many links in
2 that chain that are broken.

3 THE COURT: Well I know you keep saying that,
4 but remember we do operate under rules of evidence
5 that are applicable in both criminal as well as
6 civil cases all across the board.

7 Now, it is my understanding that on
8 the morning of the 20th, Grande was arrested as he
9 was in the process of moving some cartons out of the
10 store in a hand cart or whatever you call it.

11 MR. LIGHT: Could you be more specific.
12 Grande said sealed cartons, because it is important.

13 THE COURT: Let me say this: I would not
14 consider that an important detail. The question it
15 seems to be you might argue to the jury, that this
16 case --

17 MR. LIGHT: On a question of law --

18 THE COURT: I am trying to treat it as a
19 question of law. He identified the cartons, as I
20 remember his testimony. He did, did he not, Mr.
21 Woodfield, or am I mistaken?

22 MR. WOODFIELD: Who is that?

23 THE COURT: Didn't Grande --

24 MR. PREMINGER: No, he did not, Judge.

25 MR. WOODFIELD: He did not initial or date

212 them. He would not be able to identify them by --

2 THE COURT: I don't mean that. Didn't he
3 say that those were the cartons that he --

4 MR. LIGHT: That is the key to this whole case.

5 MR. PREMINGER: That is what I just said.

6 MR. WOODFIELD: Agent Guillen testified that
7 the cartons found in the defendant's possession were
8 these cartons.

9 MR. LIGHT: The defendant Grande.

10 MR. WOODFIELD: And they were taken from the
11 point of arrest.

12 THE COURT: In my opinion, if the agent said
13 these are the cartons that I have found in Grande's
14 possession, that is what I am trying to get to, that
15 there certainly is evidence based on Grande's state-
16 ment alone, that he received these cartons.

17 MR. LAIFER: He did not say these cartons.

18 MR. LIGHT: Sealed cartons.

19 THE COURT: That he received cartons contain-
20 ing bottles of phenobarbital.

21 MR. PREMINGER: How do we know these are the
22 bottles?

23 THE COURT: We are not back in the days of
24 middle ages here. There has to be reasonable
25 ground rules and that's what I understand you are

1 213 urging, that there must be a chain of custody from
2 the defendant himself to the Courtroom. The chain
3 is established in this respect. The agent says,
4 I seized these cartons containing these bottles
5 from the defendant at the time of his arrest. That
6 was the reason --

7 MR. PREMINGER: He did not say these
8 bottles.

9 THE COURT: I think so. The agent certainly
10 put his initials on sample bottles that are in
11 evidence.

12 MR. LAIFER: Judge Neaher, most respectfully,
13 the break in the chain that is so important here
14 is that it is alleged in this conspiracy that
15 Sciotto gave phenobarbital to Grande --

16 THE COURT: Let's take one thing at a time.

17 (Continued on next page.)
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MR. LAIFER: If I may, sir --

THE COURT: I understand. Don't get me confused. To the extent you are making an argument, seeking to have this case dismissed on the ground that the Government has failed to maintain what you call a controlled --

MR. LIGHT: That is one argument by Mr. Preminger.

THE COURT: I reject that and overrule that. So we will operate on the assumption and forget about that.

I want to get down to what matters.

MR. LIGHT: The only way that these defendants or any one of them could be in possession of those pills would be through Grande. Grande got caught with pills. They are not actually in possession, so they would have to be either in a conspiracy or some sort of constructive possession. Grande did not identify the pills in this Courtroom as the ones that he got from Sciotto.

It may sound very technical, but he said that the pills Sciotto brought him were in sealed cartons with dates on them. We have his statement which Agent Cavuto said he took. These did not have dates on them and were not in sealed

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cartons --

THE COURT: There are certain numbers. As I understand it, testimony brought out the fact that the code numbers mean a date.

MR. LAIFER: Mr. Grande said they were dated, he said the bottles.

THE COURT: We don't know what he meant by dated. There were numbers that made it possible for Mr. Light to ascertain a date which he urged upon the jury. Now we don't know how experienced Mr. Grande was in dealings of this kind nor the full and accurate extent to which he and his alleged supplier, if you can call him that, the man who brought them to him discussed them. It was obvious from what Grande did say, that when he opened the boxes and looked at them, he did make reference to the fact that they were old and discolored and burnt looking and looked like crap or words to that effect.

MR. LIGHT: We don't have one bottle burnt or old looking or that looks like crap in this Court. That is another reason it could have been different pills.

THE COURT: I am not so sure of that.

MR. PREMINGER: It was not shown in the Court, Judge.

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MR. WOODFIELD: It is quite a distinction, whether in evidence or in Court, it might be in those --

MR. LAIFER: Everything was taken subject to connection.

THE COURT: Only the evidence could go to the jury. These bottles were taken out of those cartons. So, again I am saying I want to get down to more substantial points here.

Now, as I remember the evidence, as you say the connection of any of the defendants really depends to a large extent on Grande's testimony and with respect to conversations with Sciotto.

MR. LIGHT: Grande's statement you said the Court will not accept as in furtherance of the conspiracy because he was an informant.

THE COURT: I explained to you about his statement. His statements made after his arrest, I cannot retreat from what I told you, cannot be offered as evidence of a continuation of a conspiracy. Nor can any act done by him be considered an act in furtherance of a conspiracy. Do you understand that, after his arrest. That does not preclude testimony as a direct evidence witness of events which happened prior to his arrest.

As I remember his testimony, he

1 217 received, as I recall, a visit from this man whom
2 he called Tony. Tony said he had -- I don't know
3 what he called them, pills --

4 MR. WOODFIELD: Pills for the head.

5 THE COURT: Pills for the head.

6 MR. LIGHT: Is there a conspiracy at that
7 point, Judge?

8 THE COURT: No. I don't think there is a
9 conspiracy at that point.

10 MR. LIGHT: At some point we must find a
11 conspiracy.

12 THE COURT: I know, I am troubled by some of
13 the problems I see with this case.

14 Now, Grande says, Well let's look at
15 them or words to that effect, I gather, and they do.
16 He helps him take them out. I think he helped him,
17 as I recall, or supplied him with a hand truck.

18 MR. LAIFER: That is exactly right. He had
19 a bad shoulder and supplied him with a hand truck.

20 THE COURT: He opened the trunk and took them
21 out and brought them in. So then they opened one
22 or two. I don't know and take out a couple of
23 bottles and Grande makes his famous remark, I won't
24 give you a nickel for the whole lot or whatever.

25 MR. WOODFIELD: He does not say it at that

1 218 time, but later on the telephone when Sciotto calls
2 him back.

3 MR. LIGHT: At that time he takes the stuff
4 out and Sciotto says, I will make a call.

5 MR. PREMINGER: "I am sorry, if I knew what
6 it was, I would have never brought it."

7 MR. LIGHT: Still no conspiracy.

8 THE COURT: At that point it seems to me that
9 this is without regard to Grande's later arrest,
10 you understand. At that point that would be
11 evidence it seems to me of the possession of a
12 controlled substance by Sciotto.

13 MR. LIGHT: There is no intention. You can
14 possess something without intention or knowing what
15 it is.

16 THE COURT: Just a minute. I don't think
17 you can isolate intention, because there has been
18 a change of circumstances. He came in with the
19 intention to sell those to Grande.

20 MR. LAIFER: Not knowing what they were. He
21 didn't even know what they were. Even Mr. Grande,
22 who is a Government informant, concedes that.

23 THE COURT: Let me put it this way. You
24 don't have to be a chemist or a pharmacist in order
25 to be found guilty of violating the Federal Drug

1 219 Act.

2 MR. LAIFER: You would have to have the
3 intent to unlawfully possess --

4 THE COURT: Wait a minute.

5 MR. LAIFER: The mere possession is insuf-
6 ficient as a matter of law.

7 THE COURT: All the Government has to
8 establish is that the defendant had possession of
9 a controlled substance.

10 MR. LAIFER: Knowingly.

11 THE COURT: Knowingly.

12 MR. LAIFER: And intentionally.

13 THE COURT: Intentionally with intent to
14 distribute it, which means to sell it to somebody
15 or give it to somebody. You can even be convicted
16 too for giving it away for free.

17 MR. LAIFER: Mr. Sciotto's conduct is the
18 opposite. He wanted to get rid of it. He said it
19 was junk.

20 THE COURT: My point is, when he came in and
21 had it in his possession, in his trunk, he brought
22 it to the front of that store with the intent to
23 distribute it.

24 MR. LAIFER: He did not know what it was.

25 MR. PREMINGER: He thought it was headache

1 220 pills.

2 THE COURT: Pills for the head, but the
3 Government can show that these pills for the head
4 are in fact, a controlled substance. I believe that
5 the chemist's testimony would be evident to that
6 extent.

7 MR. LAIFER: They would have to be able to
8 show that Mr. Grande knew it was a controlled
9 substance.

10 THE COURT: Forget Mr. Grande. Mr. Sciotto
11 knew it was a controlled substance.

12 MR. LAIFER: As far as sinus, there are pills
13 for the head too, Judge.

14 THE COURT: I know, but phenobarbital is
15 specifically mentioned in the statute.

16 MR. PREMINGER: He did not know.

17 THE COURT: Come on now.

18 MR. PREMINGER: There is no evidence to
19 show --

20 THE COURT: There was a bottle found in the
21 glove compartment of the car.

22 MR. PREMINGER: Judge, now wait a second,
23 there is no testimony to show he was ever in that
24 car.

25 MR. WOODFIELD: He drove up in the car.

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THE COURT: The evidence of Grande is --

MR. PREMINGER: That was a day later.

THE COURT: No, when he brought them there originally.

MR. PREMINGER: That bottle was not in the car originally, but after the arrest. That bottle was found in there two days later on the 21st, not on the 19th. There is no evidence --

THE COURT: It was found the night the car was broken into. That was the 20th.

MR. LAIFER: No, the 21st.

MR. LIGHT: It was towed on the 20th and the agent's 3500 material shows that on May 21st --

MR. LAIFER: Mr. Sciotto testified that Agent Guillen removed that bottle from the glove compartment on the 21st of May.

MR. WOODFIELD: From the time of the seizure, the previous days, it was in the custody of the garage.

MR. PREMINGER: Mr. Sciotto came to the scene. They don't even tell you how he got there. How that car got there is a mystery, but certainly he did not have exclusive control of that car.

THE COURT: I am trying to do this one step at a time.

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MR. WOODFIELD: There is one additional fact which I think defense counsel knows, and specifically, to Mr. Sciotto's knowledge and when he brought these pills for the head he quoted a price of four cents per pill. That would come to a total of \$14,000, which if broken down would mean that each one of those bottles would be worth \$40. I suggest there is an inference that could be drawn from that. That that is in fact illicit substances. If aspirin that size does not call \$40 --

MR. LIGHT: I could go to the drug store downstairs to get Excederin and in fact, it would be \$1.79 or \$1.80, more than four cents a tablet. Those jars are not to be dispensed over the counter. Those are for the drug stores. He keeps them on a shelf.

THE COURT: How many are there, a hundred or what?

MR. WOODFIELD: Quite more.

MR. LIGHT: No, one could even get a prescription for that amount. The drugist would fill it from that jar. You come in for a prescription for 20 pills and you are only supposed to get four pills a day, so if a doctor gives you a week's supply you get 28 pills and in two weeks, 56 pills.

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MR. PREMINGER: By way of documenting this, Judge, phenobarbital is not normally used in the drug trade. I am sure you have had many cases --

THE COURT: Let me put it this way. I think that you know a jury has to apply its own judgment and experience and common sense. I think there is at least an issue of fact for the jury to decide, whether accepting if one were to take Grande's testimony. Sciotto knew that he was bringing cartons containing bottles of phenobarbital. Something which does not fly around the drug stores, as you say.

MR. PREMINGER: That is not the mere evidence, that he knew it was phenobarbital --

THE COURT: Criminal cases are not decided on the basis of direct evidence. Criminal cases are decided often times on the basis only of circumstantial evidence.

MR. PREMINGER: Do you attempt to charge them that they must before they convict him --

THE COURT: Beyond a reasonable doubt.

MR. PREMINGER: He knew what was in those cartons.

THE COURT: Well as I say, they both opened the cartons. He knew then. Now here is another

1 224 thing that you forgot.

2 MR. PREMINGER: I didn't forget anything.

3 THE COURT: There is another thing you forgot.

4 Later on --

5 MR. PREMINGER: He asked for \$500.

6 THE COURT: He asked for \$500.

7 MR. PREMINGER: He explained why he wanted
8 the \$500.

9 THE COURT: I don't care what his explanation
10 is. It is clear that he is pressing the sale.

11 MR. PREMINGER: It is not a sale.

12 THE COURT: It is clear, those boxes have
13 been opened now and they know they are phenobarbital.

14 MR. PREMINGER: Judge, he says he is stuck
15 in the middle.

16 THE COURT: I don't care how he is stuck.

17 MR. PREMINGER: But Judge, you have to care
18 about the evidence. The evidence indicates the
19 \$500 is not for the pills.

20 THE COURT: The crime does not take account
21 of the problems the defendant may have with other
22 people. The crime is a simple one. Did he knowingly
23 or intentionally have in his possession at a particu-
24 lar time chronologically, a substance which is a
25 controlled substance and did he possess it at that

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time with the intent to distribute it. I have to say that as against Sciotto, such a case is made out on the possession counts.

MR. LIGHT: Then we go to Arcuri and Rothaar.

THE COURT: That is right. Now, with Arcuri, what is the argument?

MR. WOODFIELD: Well your Honor, it is my position that he aided and abetted the possession of both Sciotto and Grande of those pills. I believe that a conspiracy did commence.

THE COURT: Forget conspiracy for a moment. Let's get to the basics here. Conspiracy is the prosecutor's placing. I must confess that an awful lot is being left to inferences here, which I am not altogether sure it has a firm foundation. Let's take their role as either possessors or aiders and abettors. Now I agree with you normally, a person can have constructive possession by the simple fact that he is the boss so to speak. He has somebody who is carrying it around and he says, You sell it when I tell you to. Sell it or sell it at the price I tell you to sell it. Aiding and abetting, of course, tends to draw that out a little bit. If there is any evidence that indicates that someone gave me this stuff to do it, if that is believed, if

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someone is identified, I agree.

MR. LIGHT: That is it.

THE COURT: The heart of the matter is Sciotto walking into the laundromat on the 20th accompanied by two men and saying -- What was it again?

MR. WOODFIELD: "The guys are here for the money."

THE COURT: "The guys are here for the money." Now to me that goes right to the bull's eye.

MR. LAIFER: I think Agent McKinley said it. He says, I presume the money was for that transaction, but you can't presume.

THE COURT: I don't care what the agent presumed.

MR. LAIFER: Evidence cannot be presumed.

THE COURT: If the statement is believed, it could indicate that these men were participants with Sciotto in this transaction.

MR. LIGHT: How would it bind them when they are in the front of the store and not with Sciotto during the course of the conversation? They didn't adopt that --

THE COURT: First of all, you must bear in mind, and this has nothing to do with conspiracy,

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Grande had already indicated to Sciotto that he had the prospective buyer sitting in his office.

MR. LAIFER: Buyer which is very important, your Honor.

MR. LIGHT: And a telephone conversation. They were supposed to meet.

MR. LAIFER: "The guys are here for the money." What presumption could be drawn from that?

THE COURT: If Sciotto is led to believe that the buyer is there, what is the buyer there for --

MR. LIGHT: It is inconsistent with the telephone conversation.

THE COURT: Let me see the conversation.

(A transcript is handed to the Judge.)

THE COURT: Let me see it checked off what you say is really pertinent.

MR. LIGHT: It refers to Nostrand Avenue and Avenue N.

THE COURT: Bear in mind that telephone conversation set something up. It really has no bearing on what was said when the action took place in the laundromat.

MR. LAIFER: Most respectfully it does, sir, for this reason.

THE COURT: I am trying to reason with you.

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MR. LAIFER: I understand that.

THE COURT: I have to make up my mind whether there is enough here to warrant a jury finding. Whether there is sufficient evidence.

Now bear in mind that there are many Circuit cases in these narcotic situations. I mean the drug cases where they have said that the presence in someone in a house where narcotics are being passed around, the guy is watching, it makes him a participant.

MR. LAIFER: Most respectfully, the law in this Circuit and the country, and I don't have to tell it to your Honor, you can be present and have knowledge and that is not enough. There must be participation.

THE COURT: I understand mere presence and acknowledgement at the scene is not enough.

MR. LAIFER: That is correct.

THE COURT: There has to be something, and I mean in those cases I am referring to, some circumstance from which one can infer --

MR. LAIFER: Attributable to that particular defendant which one could infer, it cannot come from another defendant. Even if there is no conspiracy, I don't want to get back to that argument,

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but I will make the argument additionally to your Honor that with all due respect, what Mr. Sciotto said does not bind Arcuri and Rothaar, not only for the reason they were not there, but for the reason the Government has failed to prove --

THE COURT: Wait a minute. You go too fast, let's take it slowly. Sciotto certainly was willing to meet with Grande as a result of the telephone call. He was willing to meet with him. Now what was arranged, however, actually did not take place. What happened was he came there apparently, of his own volition.

MR. LAIPER: At the same time he was supposed to be four miles somewhere else.

THE COURT: I don't care. The point is he came there of his own volition. He comes there accompanied with two men and he says --

MR. WOODFIELD: "The guys are here for the money."

THE COURT: "The guys are here for the money." Now what am I supposed to think, that he is thinking of some guys down in Coney Island or out in Far Rockaway?

MR. LIGHT: That is the point. If it is unclear you have to give the point to the defendant.

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THE COURT: The word is here, not in Coney Island or Far Rockaway.

MR. LAIFER: Excuse me, if you just hear me for a moment, Judge, there are several points. Number one, the telephone conversation was to a singular individual.

THE COURT: I noted that. That was the telephone conversation. I am saying that now he says the guy --

MR. LAIFER: But, that is completely inconsistent with the telephone conversation.

THE COURT: That is an argument you can make. The question is is there any evidence?

You can argue that to the jury that it is not worth a nickel. Do you understand?

MR. LIGHT: You feel there is possession. There is no sense to keep arguing.

THE COURT: I am trying to say that if you credit the testimony of Grande that obviously, the fact that they were on the premises, that Grande not having a pipe dream that they were there, they were arrested there. What I am saying is that he comes in accompanied by two men and you can't say the man was as detached as all that. I am sure there is evidence they walked up to the office, they looked

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2 231 at the guy sitting there, one of them is shaking his
3 head and the other one then responds to an inquiry
4 from Grande saying, talk to him about --

5 MR. WOODFIELD: Yes, Arcuri says to Sciotto
6 You talk to him about the money, referring to
7 McKinley. That is the statement that is made.

8 MR. LIGHT: Grande says he overheard that.

9 THE COURT: I know.

10 MR. LIGHT: Do you feel there is enough to
11 show possession?

12 THE COURT: To show possession, constructive
13 or being under Section 2 what counsel calls or
14 demands, bringing this deal about --

15 MR. LAIFER: I would urge this your Honor,
16 that statement that Grande says Sciotto made cannot
17 bind Rothaar and Arcuri for the following reasons:

18 THE COURT: All right, I want to hear you.

19 MR. LAIFER: I don't want to go fast.

20 THE COURT: Don't go too fast. Take it
21 slowly so it sinks into my head.

22 MR. LAIFER: I tried to analyze it. I tried
23 last night. In order for what Sciotto says to
24 bind the other two defendants, one of three things
25 must happen: One, they must be present within the
area of the conversation and adopt it.

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1 THE COURT: That they were.

2 MR. LAIFER: No, they were not.

3 THE COURT: Why not?

4 MR. LAIFER: They were by the cigarette
5 machine when that discussion took place. They were
6 not even in the room. Now Agent McKinley so testi-
7 fied he never saw them.

8 THE COURT: The trouble with it is you are
9 overlooking the fact that they later walked up.

10 MR. LAIFER: That is later.

11 THE COURT: I mean he is identifying people
12 by that remark. They walk up. Now you are saying
13 that they do not hear, assuming Sciotto said it,
14 they didn't hear it said.

15 (Continued on next page.)
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MR. LAIFER: Certainly not.

MR. LIGHT: By what he says.

THE COURT: When you have followed by the remarks "You talk to him about the price." How do you drop that out of the picture?

MR. LAIFER: I will come to that. The first point is they would have to adopt what Sciotto says. Now that will be only one way. The other two ways it would be used against him if the Government established a conspiracy and, of course, the act or statements --

THE COURT: I am not talking --

MR. LAIFER: I just want to make the record clear. The only way it can be done and the third way under Section 2, if aiding and abetting, the action of one aider and abetter could be used against the other aider and abetter. You don't have that here Judge. You have an initial conversation between Sciotto and Grande allegedly with Agent McKinley present. "The guys are here for the money."

THE COURT: I want to ask Mr. Woodfield, what do you have as to it was Arcuri that made the statement?

MR. WOODFIELD: He is present on the scene, present on conversations.

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1 THE COURT: There has to be some evidence of
2 active participation by him. Where is it?

3 MR. WOODFIELD: He is there. He shakes his
4 head no and they discuss the deal. He attempts to
5 leave there after the evidence about the car is
6 relevant to his participation in this transaction.
7 His evidence, and they may argue that it is weak at
8 this point in the case, it is not relevant, there
9 is evidence to show he was in possession of the
10 car keys. That is the same car, if you believe
11 Grande which at this point we must we are not here
12 to credit him --

13 THE COURT: I am not sure I follow you on
14 that one.

15 MR. WOODFIELD: We can attribute the car keys
16 to Rothaar.

17 THE COURT: No, it was Sciotto who opened the
18 back of the white car.

19 MR. WOODFIELD: I am referring to after the
20 arrest.

21 THE COURT: On Grande's testimony, I am
22 assuming that Sciotti had possession of the keys
23 because he must have in order to open the trunk.

24 MR. WOODFIELD: That is on the day before --

25 THE COURT: Where do we find those keys

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getting to Rothaar?

MR. WOODFIELD: We find them in the agent's car he rode in. The only defendant in that car. That is the next day when that same car that was used to transport the narcotics the day before was found at the laundromat. So Rothaar is in possession of those keys and so he is associated with the car because the keys can be inferred to have been in his possession at the time the arrest occurred. The car was in that area and that is the same car that was used to transport the narcotics the day before.

The additional facts, that a portion of the narcotics was found in the glove compartment of that car, which is exactly identical and which could be assumed to be an example of the entire load. So I would say that he aided and abetted one, the distribution by Sciotto to Grande, because there is evidence that he had possession of the car keys the next day. It is the same vehicle and that vehicle is used, it can be inferred that vehicle was used for those gentlemen to come to the laundromat on that day. They're inferences, your Honor, but at this point --

MR. LAIFER: As a matter of law, you cannot

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1 have an inference on an inference. That is what I
2 am saying. One, it is an inference on an inference.
3 All Rothaar does in this case, according to the
4 Government's case, is walk up to a room and shake
5 his head and leave.

6 MR. WOODFIELD: When certain statements are
7 made that are relevant.

8 MR. LAIFER: Did he adopt any statements?
9 He did nothing but shake his head. If a man can be
10 held to shake his head --

11 MR. WOODFIELD: On the premise of a large
12 quantity of pills where the individual is introduced
13 as a buyer of the pills at a price half the price
14 quoted before, dropped from four cents to two cents.
15 Sciotto who said they wanted four cents a pill, but
16 Grande cut it down to two cents a pill. So he shakes
17 his head now. It can be inferred that he is shaking
18 his head no to this transaction based on two grounds.
19 One he does not like the price. Two, he does not
20 like the face of McKinley who is an Irish man out
21 in the back of a laundromat in Brooklyn to buy
22 narcotics.

23 MR. LAIFER: I cannot understand what that
24 has to do with it. Mr. Rothaar is half Irish. So
25 I can't see what that has to do with it. In any

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event, the mere standing in a room where an agent observed him for twenty seconds at a room and shaking his head and leaving proves nothing. Certainly, let's take the best argument for it. Let's say they saw Rothaar get out of a car. Let's say they saw him get out of a white car, which they didn't --

THE COURT: Let me ask you this for a moment. The act that is required of aiding and abetting is an action by which a jury would be justified in finding that the defendant was doing something to make the transaction succeed.

MR. WOODFIELD: I would say at that point they are still negotiating for transactions and he rejected the price of two cents per pill. It could be inferred Sciotto introduced these men as the guys for the money. Certainly an inference that we are talking about the money for these particular pills. Subsequently, they are introduced to the agent and the price of two cents is stated. McKinley said numerous times, by Grande, Rothaar rejects that and leaves.

MR. LAIFER: That is another inference on another inference. All he did was shake his head and leave. He did not say one word in this entire case. This is the case of the mute defendant. The

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best argument the Government could make must be based on three separate inferences.

THE COURT: Say it again.

MR. LAIFER: The best argument the Government could make must be based on three separate inferences. One that at one point Rothaar was in the car. Two, he knew he was in the car and three, participated in the aiding and abetting scheme in the drug transaction. The mere fact he walked to the back of the room where Sciotto and Arcuri are, is certainly not sufficient. The mere fact that the man stays there and something is said and he shakes his head and walks out is nothing. The whole participation, alleged participation, is less than a minute. And he does nothing. There is no participation.

In order to aid and abet, you said it, Judge, you must do something affirmative. There is not even a question for the jury to decide here.

MR. WOODFIELD: Your Honor, I suggest that his even going there is affirmative and he has the knowledge because he has the keys to the car. It can be inferred and there is a sample of those same narcotics in that car, they went there for a specific purpose. Sciotto announced that purpose.

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That purpose of get money.

MR. LAIFER: As to the keys to the car Judge, if I may though deal with that, not that it is really important because it would not even matter if Rothaar had been in that car unless the Government had established that he knew that the pills were there. Because the day before you have Mr. Sciotto in custody control leading and unloading the drugs in the car which would negate the participation of Rothaar. He has never been seen doing anything with the keys to that car.

THE COURT: Well the keys to the car --

MR. LAIFER: Now what do we have? What is the testimony as to the keys of the car? We have one agent who is the driver of that car who said he saw Rothaar's hands. Why didn't they bring down Dowd with the recorder. Agent Dowd, the recorder. Remember we discussed it at the sidebar. I was surprised pleasantly when they didn't because he had Rothaar's hand in full view at all times, Rothaar with the lighter. He would have seen any keys if Mr. Rothaar had any keys. You must remember your HOnor these keys were found on the seat of a car weeks later. Mr. Light, he elicited, they can fit any car. Mr. Pagan candidly admitted he did not

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recall one of the do-dads on the keys. Certainly there is no way that these keys are even constructively connectable to Mr. Rothaar.

Why wasn't Agent Dowd called? Who was the supervising agent? The other agent was the driving agent and he said he had his hands under observation. He never saw any keys in his hand.

MR. WOODFIELD: I don't think that is a proper argument, whether or not the Government did call someone else. Obviously, had Agent Dowd seen the defendant take those keys out of the pocket and put them on the seat, I would have called him. That didn't occur here. I am saying from the facts that have been introduced, a reasonable inference can be drawn that the keys were in his possession. The car was at the laundromat. It could be inferred that those three men came in the car because the car was used the day before by Sciotto who said they just gave me the keys and said the stuff was in the trunk.

MR. LAIFER: Judge, time after time we tried to elicit from Agent after Agent, if they ever saw anybody drive in that car; if they ever saw anybody possess that car; if they ever saw anybody get in or out of that car on the 20th. I opened it, I

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asked of every agent that took the stand in this case, not one agent ever recalls ever seeing the car there when these transactions took place.

THE COURT: Wait a minute. You can't blind yourself to the fact that the car was there.

MR. LAIFER: The car was there later.

THE COURT: You just can't talk it out of existence.

MR. LAIFER: No question about it, The car was there later in the day.

THE COURT: When it was opened there was found a bottle which resembles the other bottles. There was found letters addressed to Arcuri. I don't know what else. There was something else.

MR. WOODFIELD: Items that linked him to that automobile.

MR. LIGHT: One time or another he had access to the car or used the car.

THE COURT: Where you have personal correspondence in a car that shows more than mere access, that shows --

MR. LIGHT: If you loan your car to run to the dentist and I put something in the car and come back and I give you the car and the agent comes --

THE COURT: It is evidence for which a jury

1 242 might well conclude that he is indeed in the car
2 that day.

3 MR. LIGHT: That day?

4 THE COURT: Yes.

5 MR. LIGHT: The envelope is dated maybe two
6 months before.

7 THE COURT: Let's look at it.

8 MR. WOODFIELD: There is a span of time to
9 show that the inference can be drawn. He was in
10 possession of that car for a period of time.

11 THE COURT: Plus the insurance.

12 MR. LIGHT: You must have an insurance card
13 when you drive.

14 THE COURT: In someone else's car?

15 MR. LIGHT: If you are using the car.

16 MR. WOODFIELD: In the car not in your
17 possession. You have to have the card in your glove
18 compartment.

19 MR. LIGHT: Is there any question he does not
20 own the car?

21 THE COURT: There is no question. He does not
22 own the car. That is not the question. The only
23 question is did he have any connection with that car
24 which related to this transaction?

25 MR. LIGHT: You are saying this constructive

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possession that he had of that car --

THE COURT: The constructive possession that grows out of the fact that one, he has some kind of power over something and that depends on the testimony of Sciotto as related by Grande.

MR. LIGHT: The only testimony is that Sciotto used the car to bring the pills. No one saw Arcuri in that car on that day or the following day when the jar was found.

THE COURT: Well the fact that no one noticed it does not cause the car to disappear from view. You have to accept the statements of the agents that it was there when he got back. You can argue to the jury that this whole thing was -- by Grande. That he has lots of friends that brought a white car there. That they planned -- agents cars that belonged to the white car. That he found letters of Arcuri and stuck them in the glove compartment and made sure he took one of the bottles from it and put it in the glove compartment to make sure to nail these guys. What I am trying to say is that is what your argument is.

MR. LIGHT: Absolutely not. If something is found in a car on May 20th and Mr. Arcuri was not in possession of that car on the 20th, that anyone

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saw him in possession, you want the jury to draw an inference now or assume that because something was in the car that belonged to him. Why didn't they lock up the owner of the car on your theory?

THE COURT: Remember what I am trying to say is while the jury is instructed that the presence of the scene or even presence at the scene with knowledge that a crime is being committed, is not enough to make one an aider and an abetter. We agree on that.

MR. LIGHT: Right.

THE COURT: What has to be shown is something of an affirmative nature.

Now counsel here is arguing that you have to view the shaking of his head in the light of what was going on. That is really what he is saying.

MR. LAIFER: He would have to know what is going on in the context of it.

THE COURT: I am assuming he was a rational being. He did not go to the laundromat to do his laundry. There is no claim of that.

MR. LAIFER: There is no claim of anything. The defendant does not have to claim anything.

THE COURT: My point is it is not as though

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the man was standing there with a bundle of laundry listening to what was going on.

MR. LAIFER: You and I could believe something and Mr. Woodfield, but they have to prove it. Prima facie.

THE COURT: Mere presence on the scene is not necessarily equated with actually coming to a place where something is going on --

MR. LAIFER: And doing what?

THE COURT: And being embraced with somebody's statements, "Here are the guys to collect the money."

MR. LAIFER: Just being there does not mean anything --

THE COURT: I think I am of the opinion after rehashing it all out, there is sufficient circumstantial evidence for the jury to conclude that if they credit the testimony of Grande about the activities of Sciotto, that Sciotto himself had been in possession of these with an attempt to distribute, that he brought others following the telephone arrangements to try to close a deal to pick up for it. Sciotto was there to try to collect the money according to his own statement. He said I would not have brought this junk to you and all that. The other two defendants were the aiders and

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abettors. So I really think that on count one the Court would not at this point -- Now remember you can renew this motion at the end as to whether a jury could find beyond a reasonable doubt. We are not talking about beyond a reasonable doubt on your point about the sufficiency of the evidence.

Now, what about conspiracy? Where do you stand on that? My feeling is that that is the shakiest part of the Government's case as I am inclined to dismiss that.

MR. WOODFIELD: I feel that on the circumstantial evidence, that it is clear that there is a conspiracy.

THE COURT: First of all, let's put it this way, there would have to be some evidence on the part of each defendant that he associated himself --

MR. WOODFIELD: May I just try to explain the way I perceive it? Right from the beginning when Sciotto begins to deal with Grande it is clear that there are other people involved. Sciotto so states and we understand there are other people. In fact, it is clear, as your Honor indicated and there are cases such as this, he is sort of your front man and golfer. He is just given the keys to the car. There are other people involved. It is clear from that

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point. It is clear the next day who those people are or a fair inference can be drawn. They come for the money. There is only one transaction. It took a couple of different individuals in talking about price and the relation about what the actual substance was. We are talking about one transaction that is moving the quantity of pills for the head. When Sciotto attempts to further that transaction by bringing the two people, as he says, the guys are here for the money, it is those two people. So it is a step from evidence that is adduced at a later point. You can't infer back that those are the people that were there that were involved the day before and that this conspiracy had happened the previous day.

A further link to that is the automobile. The automobile is a common bond among all three of these people. There is evidence that all three of these people were connected with that automobile. That automobile one, brought the pills initially. Two, it can be inferred they brought these three individuals the next day.

MR. LIGHT: If we are going to infer conspiracy without any acknowledgement or acceptance or participation, as testimony, we are drawing an

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inference that Arcuri's stuff is in the car. We are drawing the inference that the key was found. You want to get back to the key? It sound impossible that the key could be found on the seat in July by Mr. Pagani when the car was used from May to July by how many different people and no one ever saw the key. When they took the hand truck out of the back of the car where was the key?

MR. LAIPER: Even forgetting that, Judge. Frankly, there is no evidence of any conspiracy. In fact, the evidence negates it. There is no criminal agreement. There is no proof of it between two individuals. It is initiated from Mr. Sciotto with Mr. Grande rejecting the whole thing. They rejected. If anything, they rejected.

THE COURT: I think I'd better dismiss the conspiracy counts. I am not persuaded. There must be independent evidence of the existence of a conspiracy. Even though, it may be a task. All you have is the word of Sciotto that he got these from somebody. He does not really identify them by name. Eventually, he says two fellow come along and these are the guys to pick up the money.

MR. WOODFIELD: But the automobile, your Honor, I think is the key. The automobile is the

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common bond among those three individuals.

THE COURT: In my opinion the automobile is part of it. You would be allowed to put in the evidence with regard to Arcuri's connection with the automobile. I am not saying that because that is part of the proof --

MR. LAIFER: That goes to the possession.

MR. WOODFIELD: I understand that --

THE COURT: What I am concerned about is the far fetched inference upon an inference which I feel does have to be drawn with respect to the question of the keys found on the seat of the car. I don't know, it was weeks later --

MR. WOODFIELD: May I be heard on that because I just happened to look at a few notes on Rule 29. I know your Honor is aware of this, but often it is important to go back to basics when we discuss these things. That is in ruling on a motion, such as this, you are obviously to consider all the facts. Not only all the facts, but you can draw reasonable inferences that flow from the facts. Also, you cannot and do not pass upon credibility.

THE COURT: I am not passing upon credibility. I am accepting the facts that several weeks after

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keys are discovered.

MR. WOODFIELD: It is not even several weeks. Pagan said --

MR. LIGHT: Here is the statement.

MR. LAIFER: Forget that for a moment. He says the car was used thereafter, for all DEA business for not only him, but Agent Cavuto.

MR. LIGHT: Would you look at Mr. Pagan's statement. It says "On June 23, 1976 spoke to night assistant Neil Pagan who told Agent Cavuto he found the keys on the back seat of the car and put them on the sun visor. And on the 14th Agent Cavuto went and took the keys off the sun visor."

MR. WOODFIELD: That is Agent Cavuto's report with the conversation he had with Mr. Pagan and what Mr. Pagan said to him. If you recall his testimony, he said that car was surplused near the end of May or the beginning of June. So we are talking at the most two weeks that that car may have been used.

Also, it has been brought out in evidence that none of those other defendants rode in that automobile. Nowhere are the set of keys that belonged to this white automobile going to get in the back of the Government's car.

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MR. LIGHT: No one said it belonged to the car. It fit the car. Mr. Pagan said he saw other keys fit many other cars. There is no serial numbers, no identification on these keys. It is a coincidence that the keys, which everyone said were Ford keys, fit the Lincoln.

MR. LAIFER: More than that --

MR. LIGHT: Another inference on an inference.

THE COURT: Are the keys marked Ford keys?

MR. LIGHT: They just say Ford keys.

MR. LAIFER: That is all.

(Continued on next page.)

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2
3 MR. LIGHT: Mr. Pagan said it would fit other
4 cars.

5 MR. LAIFER: In any event, Judge, we have an
6 agent observing Mr. Rothaar's hands and never saw keys
7 in his hand. Having him under observation and the
8 key agent decides this issue one way or the other,
9 the Government chose not to call

10 MR. WOODFIELD: Nor the defense.

11 MR. LAIFER: We don't have to.

12 THE COURT: The inference on an inference, the
13 theory because he was able to get his hand in his
14 pocket to get a lighter to light his cigarette becomes
15 the basis for an inference that he could get keys out
16 of his pocket if he had them. Where is the proof that
17 he had them?

18 MR. WOODFIELD: They were found in the car.

19 He was the only defendant in the car.

20 THE COURT: You have a span there of several
21 weeks. Now you don't have anything other than a
22 statement that the keys fit the Lincoln.

23 Now if they bear the name Ford on them, I don't
24 know whether that is customary for Ford to fit on a
25 Lincoln or not.

MR. LIGHT: There is no testimony, you are

2 1
2 right.

3 MR. WOODFIELD: Your Honor, we would really
4 think that would not be a fair inference to draw.
5 That since a reasonable inference is that these car
6 keys fit the door, the ignition and the trunk, that
7 they are not the keys to that trunk.

8 MR. LIGHT: Is it logical that a person that is
9 going to take keys out of the pocket and leave them on
10 the seat, is that logical? What did Mr. Pagan say
11 when he saw the keys? He thought they were the keys
12 for the car. He didn't think they were keys for the
13 Lincoln. They fit in that car, but they didn't turn
14 the ignition. Mr. Pagan says he thought they were
15 keys for the car. He tried them. That is a logical
16 inference.

17 MR. WOODFIELD: What he thought does not
18 matter. What the defendant thought does matter. He
19 knows he is going to be taken back and thoroughly
20 searched.

21 THE COURT: I think there is too much room for
22 speculation. He essentially found an inference upon
23 an inference, which I know it cannot be drawn, so I
24 dismiss the conspiracy count and submit count 1 to the
25

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3 jury.

1
2 MR. LIGHT: Your Honor precludes the keys
3 going into evidence?

4 THE COURT: Yes.

5 MR. WOODFIELD: May I just be heard?

6 MR. LAIFER: May I finish for one second?
7 Not only preclude the keys, but would your Honor
8 respectfully strike all Mr. Pagan's testimony and ask
9 the jury to disregard it, and all Mr. Cavuto's
10 testimony in that area and ask the jury to disregard
11 it?

12 THE COURT: Mr. Pagan --

13 MR. LAIFER: Mr. Cavuto and Agent -- I think it is
14 Agent Guillen.

15 MR. WOODFIELD: Only with regard to this
16 specific point.

17 MR. LAIFER: Only regarding the keys. They are
18 to disregard that.

19 MR. WOODFIELD: I would only request that
20 since I think this is a very close issue that you
21 reserve that decision to dismiss the count until
22 after there is a verdict and weigh it again then.

23 THE COURT: I am not going to submit the
24 conspiracy charge to the jury. I am going to submit
25 the possession count, count 1.

1 their respective cases, which means that all evidence
2 is concluded, so far as you are concerned.

3 Therefore, our next stage will be the final
4 summations.

5 As you recall, the Government opens and closes
6 because it has the burden of proof, but the other counsel
7 will also get the opportunity to give their summations
8 in between. Now before those summations begin, I am
9 going to instruct you now to disregard certain testimony
10 which was admitted here or at least which you have heard
11 and which the Court has now ruled to be inadmissible in
12 your consideration of the case. That is the testimony
13 of Pagan, the Drug Administration Garage witness,
14 who testified of finding certain keys in a car which
15 had been declared surplus and which he put up in the
16 visor of the car. And testimony of Agent Cavuto,
17 that he later took those keys and was able to open
18 up the White Lincoln door and start the car and open
19 the trunk. And the testimony of Agent Guillen with
20 respect to the facts that when the defendant Rothaar
21 was being transported to Headquarters, Guillen observed
22 through the mirror that Rothaar was able, despite
23 the handcuffs, to get his hand into his side pocket
24 and pull out a lighter to light a cigarette. All that
25 testimony is out of the case. Forget it. Do you under-
stand?

Rebuttal - summation

1
2 been a long time and you have heard many arguments.
3 As I said initially as the Judge will state, these are
4 arguments and they are not evidence. And I am not going
5 to sit here and go through the past with you. You
6 heard them to all the counsel and myself, but that is
7 not important. What is important is what you recall.
8 You weigh the facts, you determine the credibility
9 of the witnesses. You determine what reasonable
10 inferences can be drawn from the facts before you.
11 These are things that you can do with your composite
12 knowledge. I am not going into all the facts again.
13 I am not going to go through the tapes. I am not
14 going to go through the documents and the pills. You
15 determine that. Is it Sciotto on the tapes, you
16 determine that. You weigh the things on your minds.
17 You draw the conclusions based upon the law that the
18 Court is going to give you. I won't rebut. They say
19 they won't have occasion to come back and respond,
20 well I won't say anything further, I will let the
21 evidence speak for itself, both the exhibits and the
22 testimony. You draw the right conclusions. Thank you.

23 (The charge of the Court)

24 THE COURT: Members of the jury:

25 We are now at the stage of the trial where you

Charge

are about to undertake your final function as jurors. Your duty is a serious and important one. In performing it you actively share with the Court the responsibility of administering justice according to law and the evidence in the case. Your oath as jurors obliges you to discharge this final task in an attitude of complete fairness and impartiality and, was emphasized by me when you were selected as jurors without bias or prejudice, for or against the Government or the defendants as parties to this controversy.

The fact that this has been a relatively short case does not mean it is unimportant. The case is important to the Government, since the enforcement of the criminal laws is of prime importance to the welfare of the community.

Obviously, it is equally important to the defendants, who are charged with a serious crime and have the right to receive the fundamentally fair trial. The community has an interest in that too.

Let me add: the fact that the Government is a party entitled it to no greater consideration than that accorded to any other party to a litigation.

By the same token, it is entitled to no less consideration.

Charge

All parties, Government and individuals are alike, stand as equals before the bar of justice.

Your final role is to decide and pass upon the fact issues in the case. You are the sole and exclusive judges of the facts. You determine the weight of the evidence. You appraise the credibility of the witnesses. You draw the reasonable inferences from the evidence. You resolve such conflicts as there may be in the evidence. I shall later refer to how you determine the credibility of witnesses.

My final function is to instruct you as to the law. It is your duty to accept these instructions as to the law and to apply them to the facts as you may find them.

With respect to any fact matter, it is your recollection, and yours alone that governs. As I have already told you, anything that counsel, either for the Government or the defense, may have said, with respect to matters in evidence, whether during the trial, in a question, in argument or in summation, it is not to be substituted for your own recollection of the evidence. So, too, anything the Court may have said during the trial or may refer to during the course of these instructions, as to any matter in evidence, is not to

Charge

be taken in lieu of your own recollection.

There are certain principles of law which apply in every criminal case, and to which I made reference at the time of your selection as jurors. I repeat them now. The indictment is merely an accusation, a charge. It is not evidence or proof of a defendant's guilt. Each defendant on trial has pleaded not guilty. Thus, the Government has the burden of proving the charges against each defendant beyond a reasonable doubt. They do not have to prove their innocence. On the contrary, they are presumed to be innocent of the accusations contained in the indictment. This presumption of innocence was in their favor at the start of the trial and continued in their favor throughout the entire trial and is in their favor even as I instruct you now and remains in their favor during the course of your deliberations in the jury room.

It is removed only if and when you are satisfied the Government has sustained its burden of proving the guilt of each defendant beyond a reasonable doubt.

The question that naturally comes up is what is a reasonable doubt? The words almost define themselves that there is a doubt founded in reason and arising out

Charge

of the evidence in the case or the lack of evidence. It is a doubt which a reasonable person has after carefully weighing all the evidence. Reasonable doubt is a doubt which appeals to your reason, your judgement, your common sense and your experience. It is not caprice, whim, speculation, conjecture or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

If, after a fair and impartial consideration of all the evidence, you can, candidly and honestly, say you are not satisfied of the guilt of the defendant, that you do not have an abiding conviction of his guilt, in sum, if you have such a doubt as would cause you, as prudent persons, to hesitate before acting in matters of importance to yourself, then you have a reasonable doubt, and in that circumstance it is your duty to acquit.

On the other hand, if after such an impartial and fair consideration of all the evidence, you can, candidly and honestly, say you do have an abiding conviction of a defendant's guilt, such a conviction as you would be willing to act upon in an important and weighty matter, in the personal affairs of your own life, then you have no reasonable doubts, and under

Charge

such circumstances, it is your duty to convict.

One final word on this subject. Reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule, few persons, however guilty they might be, would be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted facts, which by its nature is not susceptible of mathematical certainty.

In consequence, the law in a criminal case is that it is sufficient if the guilt of the defendant is established beyond a reasonable doubt, not beyond all possible doubt.

Before I turn to the charges against the defendant, I caution you that the guilty plea entered by Joseph Grande, a codefendant, is no evidence whatever, or the guilt on the part of any of the defendants on trial, and you must not permit his plea to enter into your deliberations at any time.

As I have said, the guilt or innocence of the defendants on trial must be determined upon the evidence or lack of evidence as to that defendant.

Each defendant is entitled to your separate consideration of the evidence as to him, as if he alone

Charge

were on trial.

Now, let us turn to the charge against the defendants on trial.

The single charge before you now is that contained in count one of the indictment, which alleges a violation of a Federal law, commonly known as the Drug Act. The fact that count two has been withdrawn from your consideration as the result of a ruling by the Court, should be of no further concern to you and should not enter into your deliberations in any way. Now count one which I will reread, charges that on or about the 20th day of May, 1976, within the Eastern District of New York, the defendants Phillip Peter Acuri, William J. Rothaar, and Anthony S. Sciotto, did knowingly and intentionally possess with intent to distribute approximately, three hundred thousand tablets of phenobarbital as scheduled for control substance in violation, as I have said, of provisions of Federal Drug Act.

Now the Congressional purpose expressed in the Drug Act as to exercise Federal Control in order to prevent traffic in, or improper use of drugs having a substantial and detrimental effect on the health and general welfare of the American people. Criminal penalties of fine or imprisonment or both are provided

Charge

for violations of the act. The provisions upon which the charge in this indictment is based reads as follows: I refer to Section 341(A) and (1). "It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute a controlled substance."

Before I spell out what the Government must prove in order to establish a violation of the foregoing statute, there are certain terms which require explanation. Section 341 requires that the possession be done knowingly or intentionally. The purpose of the word, "knowingly" in the statute is to insure that no one shall be convicted for an act done because of a mistake or accident or other innocent reasons. An act is done "knowingly" if done voluntarily and intentionally, that is, deliberately. A transaction is not intentional unless it is knowing. So the two words, "knowingly" and "intentionally" may be considered together.

The words with intent to distribute simply means with the intent that the narcotics or the controlled substance, I should refer to that here because we are not dealing with narcotics as such we are dealing with a controlled substance, but still under the Federal

Charge

1 Drug Law that the controlled substance is not possessed
2 for ones personal use, but is intended to be delivered,
3 that is transferred or made available to someone else.
4 The word possess as used in the statute is understood
5 in law to describe too types of possession: actual
6 possession or constructive possession. Actual
7 possession means that the defendant knowingly has
8 personal, manual or physical control of the controlled
9 substance, such as this phenobarbital.
10

11 Constructive p ossession means that though
12 the controlled substance is in the physical possession
13 of another person, a defendant knowingly has the power
14 to exercise control over it or its distribution. That
15 is, to set the price for its sale or to cause its
16 delivery.

17 Finally, a word about the terms controlled
18 substance appearing in the statute. Those terms are
19 used because the law applies to a broad range of
20 narcotic drugs and substances which have drug-like
21 effects, such as the phenobarbital referred to in the
22 indictment .

23 Now turning to the elements which the Government
24 must establish beyond a reasonable doubt before any one
25 of the defendants may be convicted of the crime of

Charge

possession with intent to distribute, the following three essential elements must appear; one. That on or about the date mentioned in the indictment the defendant possessed with intent to distribute the quantity of phenobarbital specified. Two. That he did so knowingly or intentionally. Three. That the controlled substance was in fact phenobarbital.

Now in considering the evidence bearing on the foregoing elements, there is an important point you should keep in mind. The government's evidence would attempt to show that it was the defendant Sciotto who made an actual delivery of cartons of pills to Joseph Grande. Now that led to the charge contained in the indictment. The fact that Sciotto acted alone at that time would not necessarily relieve the other defendants of criminal responsibility.

Where two or more persons are charged with the commission of an offense such as that alleged in the indictment, the guilt of any defendant may be established without proof that he personally did every act constituting the offense charged. This is so because under section two of Title 18, United States Code, every person who willfully participates in the commission of a crime may be found to be guilty of that

Charge

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2 offense. Section two reads: "Whoever commits an
3 offense against the United States, or aids, abets,
4 counsels, commands, induces or procures its commission,
5 is punishable as a principle.

6 Whoever willfully causes an act to be done,
7 which if directly performed by him or another would
8 be an offense against the United States, is punishable
9 as a principle."

10 Under this statute it is not even necessary
11 that the aider or abettor be present at the actual
12 commission of the offense.

13 I caution you, however, that mere presence
14 at the scene of a crime or guilty knowledge on the
15 part of a person would not suffice to make him an
16 aid or an abettor. You must be convinced beyond a
17 reasonable doubt that the person was knowingly doing
18 something to assist in accomplishing the crime.

19 To determine whether a particular defendant
20 aided and abetted the commission of an offense, you
21 should ask yourself these questions: Did he associate
22 himself with the venture? Did he participate in it
23 as something he wished to bring about? Did he seek
24 by his actions to make it succeed? If he did, then
25 he is an aider and abettor. Accordingly, you may find

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Charge

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2 a defendant guilty of the offense of knowingly and
3 intentionally possessing the phenobarbital mentioned
4 in the indictment with intent to distribute it, if
5 you find beyond a reasonable doubt that the defendant
6 Sciotto committed the offense and that the particular
7 defendant you are considering aided and abetted him.

8 Now whether a defendant knowingly and intention-
9 ally participated or aided or abetted in the claim to
10 possession of phenobarbital with the intent to
11 distribute it presents an issue of facts. Clearly this
12 concerns what is in a person's mind. Medical science
13 has not yet devised an instrument whereby we can go
14 back to the time of the occurrence of the events and
15 determine what then was the person's intent or know-
16 ledge.

17 These may only be determined from one's acts,
18 his conduct and surrounding circumstances, and such
19 inferences which may reasonably be drawn therefrom.

20 A defendant may be proven guilty by either
21 direct or circumstantial evidence. Direct evidence
22 is the testimony of one who asserts actual knowledge
23 of the fact, that which comes to him by virtue of
24 his senses, such as an eye witness. Circumstantial
25 evidence is proof of a chain of facts and circumstances

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Charge

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2 indicating the guilt or innocence of a defendant; where
3 facts are established from which, in terms of common
4 experience, one may logically infer other facts that
5 are thought to be established. A common example to
6 illustrate what I mean, you are here in a courtroom
7 now without windows. When you last outside it was
8 clear. In comes somebody through the door and you can
9 see that his clothes are wet and you might immediately
10 conclude that from the fact of his appearance that
11 the weather outside had changed. That is inferring a
12 fact you are not seeing from a fact you are seeing.
13 Do you understand?

14 Now the law makes no distinction between the
15 weight to be given to either direct or circumstantial
16 evidence. Circumstantial evidence, if believed, is of
17 no less value than direct evidence for in either case
18 you must be convinced beyond a reasonable doubt of the
19 guilt of the defendant.

20 If you find circumstances of secrecy or
21 attempts to conceal the true nature of the trans-
22 action, these may be considered by you as circumstan-
23 tial evidence of criminal intent.

24 Proof of motive is not a necessary element of
25 the crime with which the defendants are charged. Proof

Charge

of motive does not establish guilt, nor does want of proof of motive establish that a defendant is innocent.

If the guilt of a defendant is shown beyond a reasonable doubt, it is immaterial what the motive for the crime may be or whether any motive be shown, but the presence or absence of a motive is a circumstance which you may consider as bearing on the intent of a defendant.

You have just heard the summations of counsel reviewing the evidence as they see it and suggesting inferences you may draw from that evidence. I will not therefore attempt to recall for you the evidence upon which the Government and the defendants rely to support their respective contentions.

All evidence, whether or not referred to by counsel, is important and must be considered by you.

If any reference to testimony does not agree with your recollection, and I have stated this before, you are to disregard such references. I emphasize this as strongly as I can.

Always, it is your recollection, and yours alone that governs, and you must unhesitatingly reject any statement as to a fact which does not accord with your own recollection. It must be apparent to you that

Charge

1
2 the versions of the Government and the defense are
3 in sharp divergence on key points and that critical
4 issues of fact and credibility are raised.

5 You are called upon to decide the fact issues
6 here. How do you decide them? Now I think you under-
7 stand why at the start of the trial I suggested that
8 it would be desirable and important for you not only
9 to listen, but to look at the witnesses as they
10 testified. Your determination of the issue of
11 credibility ver largely must depend upon the
12 impression that a witness made upon you as to whether
13 or not he was telling the truth or giving you an
14 accurate version of what occurred.

15 I often say to jurors, when you walk in the door
16 of the courtroom and sit in the jury box, while the
17 trial is going on, you have your common sense, your
18 good judgement and your experience with you and that
19 they go with you into the jury room when you retire to
20 deliberate. You decide whether or not a witness was
21 straightforward and truthful; whether he attempted to
22 conceal anything; whether he has a motive to testify
23 falsely; whether there is any reason why he might
24 color his testimony. In other words, what you try to
25 do, to use the vernacular, is to size a person up just

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1 as you would do, as I have said before, in any
2 important matter where you are undertaking to determine
3 whether or not a person is truthful, candid and
4 straightforward.

5 In passing upon the credibility of a witness,
6 you may also take into account inconsistencies or
7 contradictions as to material matters in his own
8 testimony, or any conflict with that of another
9 witness. A witness, however, may be inaccurate,
10 contradictory, or even untruthful in some respects, and
11 yet be entirely credible in the essentials of his
12 testimony. The ultimate question for you to decide
13 in passing upon credibility is did the witness tell
14 the truth here before you as to essential matters?

15 Now aside from those general considerations,
16 there is a special instruction required in this case.
17 As you are aware, the government contends that through
18 the testimony of the witness Joseph Grande, it has,
19 in addition to circumstantial evidence, also direct
20 proof of the commission of the offense charged. Mr.
21 Grande as you remember was named in the indictment as
22 a codefendant. He thereafter, pleaded guilty. By his
23 own admissions on the stand he must be regarded as an
24 accomplice in the offenses for which the defendants on
25 trial are charged. An accomplice is one who willfully

Charge

associates himself with the commission of a crime.

The law does not prohibit the use of accomplices and whether you approve or disapprove of their use is not to enter into your consideration of the case. In certain types of crimes the Government, of necessity, is frequently, compelled to rely upon the testimony of accomplices. Otherwise, it would be difficult to detect or prosecute some wrong doers, and this is particularly true in a case such as this. Often, it has no choice in the matter. It must take witnesses to the transactions as they are. There is no requirement in the Federal court that the testimony of an accomplice be corroborated. A conviction may rest upon the uncorroborated testimony of such a witness, if it is found credible and reliable. However, the testimony of such a witness should be viewed with great caution and scrutinized carefully.

Nevertheless, it does not follow that because a person has acknowledged participation in a crime or is an accomplice, that he is not capable of giving a truthful version of what occurred.

You should ask yourself these questions: Did Grande give false testimony, or color his testimony, contrary to facts, because he has been allowed to plead

Charge

to the one count in the indictment to which it refers or believe that his cooperation may result in more lenient treatment. If you find his testimony was deliberately untruthful, you should unhesitatingly reject it. On the other hand, if, upon a cautious and careful examination, you are satisfied that he has given a truthful version of essential events, beyond a reasonable doubt, there is no reason why you should not accept it.

Now I remind you again, that once Grande was arrested and began cooperating with the Government, he became in effect an agent of the Government. At that point his statements may not be used by you. I mean his statement of events occurring may not be used as evidence against these defendants, but only to the extent that he testified to something he heard one or another of the defendants say or that he saw one or the other defendant do something, because you must judge a defendant's participation in a crime by what he said or what he did. Although, you may gain that knowledge only because someone else says he witnessed it being said or witnesses it being done. What I am trying to make clear to you is that any conversation of Grande with people may not be considered by you as

Charge

evidence of crime or criminal intent on their part.
Do you follow me, is that clear, because it is very important.

Now, the fact that some Government witnesses here were Government agents, does not entitle their testimony to any greater weight or consideration than that afforded to any other witness in the case. You will evaluate their credibility the way you would do that of any other witness. If you find that any witness, and this applies alike to Government and defense, willfully testified falsely as to any material fact, you have a right to reject that testimony of that witness in its entirety or you may accept that part or portion which commends itself to your belief as credible.

The defendants have not testified in this case. That is their absolute right and in no respect may be considered by you as any evidence against them or as the basis for any presumption or inference unfavorable to them. You must not permit that fact to weigh in the slightest degree against them nor should it enter into your deliberations or discussion. The evidence in this case consists of the testimony of all witnesses. Except that which I have instructed you

Charge

to disregard, all exhibits received in evidence, the taped conversations you heard.

All evidence, whether or not I have referred to it, or counsel has mentioned it in their summations, is important and must be considered by you. If per chance any reference to testimony does not agree with your recollection, and I have stated this more than once before, you are to disregard such references. I emphasize this as strongly as I can. Always, it is your recollection, and yours alone, that governs, and you must unhesitatingly reject any statements as to a fact, whether made by the Court or Counsel, which does not accord with your own recollection of the evidence.

Bear in mind, as I say, that guilt is personal. The guilt or innocence of the defendants on trial must be determined solely upon the evidence presented against them, or the lack of evidence. The charge against each of them stands upon the proof or lack of proof against them individually and not as against the codefendant.

During the course of the trial, the attorneys are various times have objected to certain questions, have moved to strike answers, and taken other

Charge

procedural positions before you.

These are matters of technical procedure that are the proper concern of the attorneys and should not concern you.

I instruct you that you are not to draw any inferences from the fact that attorneys have made objections and motions before you during the trial. The Government, to prevail, must prove the essential elements by the required degree of proof, as already explained in these instructions. If it succeeds, your verdict should be guilty; if it fails, your verdict should be not guilty.

The case of each defendant must be considered separately as if he alone were on trial. The verdict in each instance must be unanimous. Your function as jurors is to weigh the evidence in the case and to determine the guilt or innocence of the defendants solely upon the basis of such evidence and these instructions.

Under your oath as jurors, as I mentioned previously, you can not allow a consideration of the sentence which may be imposed upon a defendant, if he is convicted, to enter into your deliberations or to influence your verdict in any way. Your duty is to

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2 decide the case solely and only upon the evidence.

3 In the event of a conviction, the duty of
4 imposing sentence rests solely with the Court. During
5 deliberations each juror is entitled to his or her own
6 opinion, but you should, however, exchange views with
7 fellow jurors. That is the very purpose of jury
8 deliberations, to discuss and to consider the evidence,
9 to listen to the arguments of fellow jurors; to present
10 your individual views; to consult with one another
11 and to reach an agreement based solely and wholly
12 on the evidence, if you can do so without violence to
13 your own individual judgement.

14 Each one must decide the case for himself or
15 herself after consideration with his or her fellow
16 jurors. You should not hesitate to change an opinion
17 which after discussion with your fellow jurors appears
18 erroneous. However, if after carefully considering
19 all the evidence and the arguments of your fellow
20 jurors, you entertain a conscientious view that
21 differed from others, you are not to yield your judge-
22 ments simply because you are out numbered or out
23 weighed. Your final vote must reflect your conscientious
24 view as to how the issue should be decided.

25 The charge here is a serious one. The just

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determination of this case is important to the public:
it is equally important to these defendants.

Under your oath as the jurors, you must decide
this case without fear or favor and solely, as I have
stated a number of times, in accordance with the
evidence and the law. If the Government has failed
to carry its burden as to a defendant, your sworn
duty is to acquit. If it has carried its burden as
to a defendant, you must not flinch from your sworn
duty, you must convict.

Now members of the jury, I have to perform
an immediate task and that is to separate the three
alternate jurors from their brothers, since only 12
may deliberate at this juncture. I am going to excuse
the three of you with my thanks for your patient
attention and give you an opportunity to recover your
things in the jury room and then you may go downstairs
and check out. Thank you very much.

(At this point the three alternates leave the
jury room.)

(Continued.)

TSCP/fip.

(At this point the three alternates leave the jury room.)

THE COURT: Now in accordance with custom, Juror number one serves as your foreman. You will be provided pencil and paper. If during the course of your deliberations you have a question that requires an answer or any requests, write it on a slip of paper and give it to the marshal who will be guarding your door and he will come to me and I will conference with counsel and we will discuss what need be done.

Now bear in mind that the testimony here has been recorded. There are also, of course, quite a few exhibits which have been introduced into evidence. You are entitled to have them in the jury room if you want them. My recommendation, based on some years of experience, is that having heard the testimony, having heard the summations of counsel; you go in and you discuss the case. If some point of controversy or some need to have something reread or some exhibits examined comes up, ask for it then. In other words, I am trying to say don't ask for the whole reading of testimony, but rather discuss it and as I say, if some particular portion of testimony is critical for the resolution of some difference or other among you, ask for that to be reread and we will have

2 1 it done. Similarly, if there is some particular
2 exhibit or exhibits which excite your interest from
3 the standpoint of resolving a controversy, ask for
4 them and a sufficient description and we will know
5 what you mean. I am sure if we don't, we will call
6 you in and ask you.

7 I imagine the other jurors have left. I am
8 going to suggest that you deliberate a while. Let me
9 point out to you that it is your option as to whether
10 after a period of deliberation, if you feel that you
11 are unable to reach a verdict you are at liberty,
12 I mean at that time you are at liberty to decide whether
13 you wish to stay and pursue it further or ask the
14 Court or tell the Court that you would prefer to
15 suspend for the evening and return in the morning and
16 resume your deliberations at that time.

17 Now I am going to let you go outside to the
18 jury room now while I give counsel an opportunity to
19 tell me whether I have misspoken or omitted anything
20 from my instructions, which they believe should have
21 been said. So as soon as that is over, which should
22 be a minute or two, the marshal will get the word to
23 you to begin your deliberations and you may go ahead.

24 (At this point the jury leaves the courtroom.)

25 (At this point the marshals are sworn in by the

3 1 Clerk of the Court.)

2 MR. LAIFER: We will waive being present for
3 any exhibits that the jurors ask for and stipulate
4 that they be sent in without our presence, without
5 our client's presence.

6 THE COURT: Just as to exhibits, ok.

7 MR. PREMINGER: Yes, I would just ask that you
8 charge on Grande's accomplice status, but you didn't
9 mention the facts that he had a prior criminal record
10 and how they should consider that with regard to his
11 credibility.

12 MR. LAIFER: But they may consider his criminal
13 record in determining credibility.

14 THE COURT: Unfortunately, nobody reminded me
15 of that. Normally, when it comes up in a charge, I
16 assume that counsel covered in their summations. It's
17 rarely, if ever, that I am aware of a basis, unless it
18 is some horrendous, you know thing. I just hesitate
19 at this point to call them in and tell them that
20 because it gives undue emphasis and moreover, as I
21 pointed out to you at the time, I really was not quite
22 sure what his criminal record was. First of all, the
23 arrest would not be a criminal record.

24 MR. PREMINGER: I don't insist on it.

25 I just felt --

4 1 THE COURT: Well therefore, what were we to say?

2 MR. LAIFER: We don't press it, Judge. I would
3 ask that they may not draw inferences from an inference.
4 I may have said that.

5 THE COURT: I thought we eliminated the occasion
6 for that.

7 MR. LAIFER: Well, there is still that section
8 two of Title 18.

9 THE COURT: Well I will have to see what you
10 are referring to.

11 MR. WOODFIELD: I thought your charge on the
12 whole was very good and clear with regard to inferences.
13 I thought the term inference on inference in and of
14 itself is confusing. It muddies the water.

15 MR. LAIFER: I don't press it.

16 THE COURT: I say I never do. In other words,
17 I tell them what an inference really means based on
18 circumstantial evidence. They usually seem to under-
19 stand that pretty well.

20 MR. LAIFER: Otherwise, I have no exception
21 to the charge.

22 MR. PREMINGER: I have no exception. I have
23 a request for your Honor to charge the jury that
24 if a person's conduct is as consistent with guilt as
25 well innocence, that you must give them, the jury

5 1 must give them the benefit of a doubt and go to acquit.

2 THE COURT: I will have to get my exhibit on that.

3 MR. LIGHT: Your Honor intends to at a certain
4 point send the jury to dinner?

5 THE COURT: I asked you fellows specifically to
6 give me these things and I broke my back during my so-
7 called lunch hour to get this together. I said I
8 will give several minutes to discuss the matters.

9 MR. LIGHT: Will there be a point at 6:30 that
10 you will send them to dinner?

11 THE COURT: I told them they have the option.

12 MR. LIGHT: I would like them to deliberate
13 for a while.

14 THE COURT: I said I will give them the option
15 to deliberate for a while and after having done so,
16 if they were of the opinion that no useful purpose would
17 be served by staying on, but that they would rather
18 come back tomorrow and do it, that is left up to
19 them. If they want to stay --

20 MR. PREMINGER: But you didn't tell them you
21 would send them to dinner.

22 MR. WOODFIELD: Your Honor, just a housekeeping
23 thing, I have to get to the narcotic exhibits. Of
24 course, you don't allow them to go to the jury in any
25 case.

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3 THE COURT: We have a note from the jury. Are
4 you aware of that?

5 MR. LAIFER: Yes.

6 THE COURT: I don't know who has the -- I
7 imagine these are Government's exhibits they ask for.
8 The contents of the glove compartment -- He also asks
9 for the transcript which is not in evidence. I was
10 going to tell them it's not in evidence, but if they
11 wish they may here the playback of the transcript.

12 MR. LAIFER: No objection.

13 THE COURT: What I usually do is write them a
14 note and say the transcript of the telephone conversation
15 is not in evidence. If you wish to hear a playback of
16 the actual conversation, you may. That is up to them,
17 then.

18 There will be no disagreement with what was in
19 the glove compartment? Some documents, a bottle, and
20 the gloves and a cap.

21 MR. LAIFER: Yes. There were gloves, cap, there
22 was a bar mitzvah invitation --

23 THE COURT: Several documents, a bottle and the
24 cap.

25 MR. LAIFER: Yes.

MR. WOODFIELD: Good morning, your Honor.

THE COURT: That is the note. They want exhibits

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1 taken from the glove compartment, the bottle, the series
2 of documents, and a hat and gloves.

3 MR. WOODFIELD: Let me go through them and make
4 sure.

5 THE COURT: With respect to the transcript, I
6 have written them this note, I will read it into the
7 transcript:

8 "The transcript of the telephone conversation
9 is not in evidence. If you wish, you may again have
10 the actual telephone conversation played back."

11 I am leaving it up to them. Is that agreeable?

12 MR. LIGHT: Yes, sir, your Honor.

13 MR. WOODFIELD: Yes.

14 THE CLERK: Jury note marked Court exhibit 1
15 and Court note marked exhibit 2.

16 THE COURT: If they want it played back, knock
17 on the door and I will come back.

18 (Recess.)

19 (continued next page)
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AFFIDAVIT OF PERSONAL SERVICE

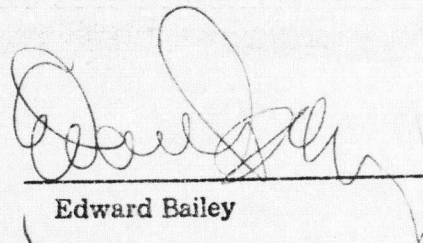
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

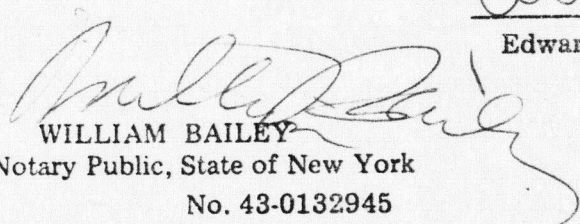
EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 11 day of August, 19 77 at No. 225 Cadman Plaza East, Brooklyn, NY

deponent served the within ~~brief~~ *appendix*
upon U.S. Atty., East. Dist. of NY

the Appellee herein, by delivering 3 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me this
11 day of August 1977.


Edward Bailey


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978